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In The

Supreme Court of the United States

October Term, 1996

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Petitioners,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH, III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the panel held that after a state court class action had been settled, the *Rooker-Feldman* doctrine deprived a federal district court of subject matter jurisdiction over class members' claims – of violations of the Racketeer Influenced and Corrupt Organizations Act and the Civil Rights Act of 1871, and of common law fraud, attorney malpractice, conversion, fraudulent concealment, negligent misrepresentation, and breach of fiduciary duty – *even if* the state court judgment was entered without personal jurisdiction over the class members, in violation of their due process rights, and would not be entitled to full faith and credit. The questions presented are:

1. Did the panel err in holding that, whether or not the state court had personal jurisdiction over the plaintiff class members or otherwise violated their due process rights, the *Rooker-Feldman* doctrine deprived the federal district court of subject matter jurisdiction?

2. Does the *Rooker-Feldman* doctrine preclude class action litigants from bringing actions for fraud and malpractice against their lawyers?

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PETITION FOR A WRIT OF CERTIORARI

This petition for a writ of *certiorari* involves fundamental questions concerning the due process rights of class members, the relationship between state and federal courts, and the jurisdiction of federal courts. Plaintiffs' federal court complaint alleged a massive fraud perpetrated upon them during and after the settlement of a nationwide class action in Alabama state court. This alleged fraud, committed by lawyers representing a class of which plaintiffs were members and by the defendants and their attorneys in the Alabama action, resulted in the taking of money from the class members' own escrow accounts to pay attorneys' fees. The result of the fraud was that most, if not all, class members were left with a net out-of-pocket loss. As part of the malfeasance, the absent class members had their property taken from them without due process and were deprived of their constitutional rights to meaningful notice, adequate representation, and an opportunity to opt out of the Alabama action.

Holding that the complaint would require it to review what had happened in the Alabama state court, the district court dismissed it for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.[1] A panel

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[1] The *Rooker-Feldman* doctrine stands for the proposition that this Court is the only federal court authorized to review a state court judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The doctrine derives from 28 U.S.C. § 1257, which vests review of final judgments of state courts exclusively in this Court. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989) ("[t]he *Rooker-Feldman* doctrine interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is

of the Seventh Circuit Court of Appeals affirmed. Five judges of the court of appeals dissented from that court's denial of a petition for rehearing *en banc*, and, in their opinion *sur* the denial of rehearing, declared that the panel's opinion could not be reconciled with this Court's precedent holding that absent class members cannot be bound by a class action judgment rendered in the absence of meaningful notice, adequate representation, and an opportunity to opt out. According to the dissenting judges, such a judgment cannot bar plaintiffs' claims in federal court under the *Rooker-Feldman* doctrine.

Certiorari is warranted because the panel's ruling squarely conflicts with the decisions of this Court, with the decisions of other courts of appeals, and with the constitutional principle that a judgment entered without personal jurisdiction is null and void. By elevating the *Rooker-Feldman* doctrine over this constitutional principle, the panel in effect makes the *Rooker-Feldman* doctrine an exception to this Court's due process jurisprudence, rendering a state court judgment that would not be entitled to full faith and credit in any other court unassailable in federal court. The panel's opinion also creates a conflict among the courts of appeals, the majority that have reached the issue having held, in contrast to the Seventh Circuit, that class action litigants can maintain fraud and malpractice actions against their lawyers.

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vested solely in this Court"); *see also Johnson v. DeGrandy*, 512 U.S. 997, 114 S. Ct. 2647, 2654 (1994) (describing the "*Rooker-Feldman* abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court, based on the losing party's claim that the state judgment itself violates the loser's federal rights").

OPINIONS BELOW

The opinion of the court of appeals (A. 1-15) is reported at 92 F.3d 506. The opinion dissenting from the denial of the petition for rehearing *en banc* (A. 35-48) is reported at 100 F.3d 1348. The opinion of the district court (A. 16-34) is not reported, but can be found at 1995 U.S. Dist. LEXIS 18973 or 1995 WL 758422.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. A timely petition for rehearing was filed on August 22, 1996, and denied on November 22, 1996. A. 35. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1 of the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article IV, Section 1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of *certiorari* where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

Dexter and Gretchen Kamilewicz, who reside in Maine, and Martha Preston, who resides in Wisconsin ("the *Kamilewicz* plaintiffs"), were among several hundred thousand class members allegedly defrauded by the lawyers purporting to represent them, by their bank, and by the bank's lawyers in the settlement of a class action in Alabama state court. The class members had money taken from their own mortgage escrow accounts to pay legal fees to the attorneys who were supposedly representing them in the class action. The fees far exceeded the amount – not more than one-third of the economic benefit to the class – that the class action notice told the class members the fees would be, and resulted in most, if not all, class members incurring a net out-of-pocket loss as a result of their inclusion in the class. A. 70-71. For example, Dexter and Gretchen Kamilewicz paid $91.33 in attorneys' fees to recover $2.19. A. 2.

The *Kamilewicz* plaintiffs had been included as class members in a nationwide class action filed by Illinois and Alabama lawyers in Alabama state court against Bank of Boston Corporation ("Bank of Boston") and BancBoston Mortgage Corporation ("BancBoston"). *Hoffman, et al. v. BancBoston Mortgage Corp., et al.*, No. CV-91-1880 (Mobile Cty. Cir. Ct. May 28, 1991) ("the *Hoffman* action"). A. 51, 59. In the *Hoffman* action, the *Kamilewicz* plaintiffs were absent class members from outside of Alabama: they were not named plaintiffs, nor did they otherwise appear. The relief sought in the *Hoffman* action was to recover immediately (rather than at the termination of the mortgages) the excess escrow amounts held in the accounts of approximately 715,000 mortgagors. A. 51, 52. The excess escrow money always belonged to the mortgagors and indisputably would have been returned to them at the

termination of their mortgages – the only issue in the *Hoffman* action was the propriety of BancBoston holding the excess amounts until the mortgages terminated. A. 52.

The Alabama court granted partial summary judgment to the plaintiff class on its breach of contract claim, and settlement ensued. A. 70. Class counsel prepared a form of notice to the class members, describing the action and a proposed settlement, which stated that the settlement was "fair, reasonable, adequate, and in the best interests of the class" and that the attorneys' fees sought were "reasonable" and would "not exceed one-third of the economic benefit" to the class. A. 70-71. The Alabama court approved the notice, and it went to the hundreds of thousands of class members. A. 83. With their information limited solely to what was in the terms of the notice, only 0.4% of the persons who received the notice opted out or objected (and many of these apparently were people who intended to "opt in," not to opt out). A. 85.

The Alabama court approved the settlement, which provided: (a) BancBoston would change its escrow practices; (b) each class member would receive a one-time interest payment in an amount ranging from $0.00 to $8.76; (c) the class members would be refunded any excess escrow money in their accounts; and (d) class counsel would receive attorneys' fees equaling 28% of the total excess escrow funds held by BancBoston in the class members' mortgage escrow accounts. A. 77. The settlement provided that a specific amount for attorneys' fees was to be deducted from each class member's escrow account (A. 77), regardless of whether that class member received any refund or interest payment.

The settlement was implemented: BancBoston credited some class members' accounts with their minimal interest payments; returned to those class members who

had any excess escrow funds the money due; and deducted from each class member's account money to pay the class lawyers. A. 87-89. BancBoston labeled the deductions for attorneys' fees "miscellaneous disbursements" on the class members' annual account statements. A. 88.[2] The result of the settlement was that most, if not all, of the class members lost money because the amounts deducted from their mortgage accounts to pay attorneys' fees exceeded the benefits provided by the settlement, while their attorneys received a total of $8.5 million.

After discovering the fraud that allegedly had been committed, the *Kamilewicz* plaintiffs filed a class action complaint in the District Court for the Northern District of Illinois against the class counsel (two of the three of which reside in Illinois), the banks (which do business in Illinois), and the banks' lawyers. A. 49-105. They alleged that all defendants had conspired to take their money in violation of the Racketeer Influenced and Corrupt Organizations Act and were liable for common law fraud, fraudulent concealment, and negligent misrepresentation; that class counsel also had deprived plaintiffs of their property without due process of law in violation of the Civil Rights Act of 1871, had committed malpractice, and had breached its fiduciary duty to them; and that the bank had converted their money and breached its fiduciary duty by allowing money to be taken from their

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[2] While in their decision dissenting from the denial of rehearing *en banc* in the Seventh Circuit Court of Appeals, the dissenters assumed that "[e]verything the Bank did to affect Kamilewicz's interests was authorized by the judgment based on the settlement," (A. 37-38), BancBoston's failure to explain the reason for the "miscellaneous disbursement" on the class members' account statements was not so authorized.

escrow accounts for reasons not authorized by their escrow agreements.[3]

The district court dismissed the complaint for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, concluding that "the plaintiffs are asking us to undo what the Alabama court did, and that constitutes a[n] impermissible collateral attack upon the state court judgment." A. 31. It reasoned that "[i]f we were to address the merits of the plaintiffs[']] claims, we would have to re-examine documents filed with and approved by the Alabama court, such as the notice of proposed settlement, and we would have to re-open, in effect, the Alabama court's decision regarding the economic benefit to the class and the reasonableness of the award of attorneys' fees." A. 31. Because "[t]he *Rooker-Feldman* doctrine prohibits us from doing any of this," (A. 31), the district court held that it lacked subject matter jurisdiction over plaintiffs' claims.

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[3] After the *Kamilewicz* plaintiffs commenced this action, certain of the defendants took further steps in Alabama state court, a jurisdiction that the *Kamilewicz* plaintiffs contend lacks jurisdiction over them. First, certain of the defendants caused the Alabama state court to issue an order and opinion "preclud[ing] [the *Kamilewicz* plaintiffs] from reasserting the claims dismissed in the Federal Class Action in any forum." A. 118. Second, while this case was pending before the court of appeals, defendant Edelman and his law firm filed suit in Alabama state court against the *Kamilewicz* plaintiffs and their attorneys for malicious prosecution, abuse of process, and tortious interference with contract – all claims based solely on plaintiffs having brought their federal action. *Edelman and Edelman & Combs v. Wildman, Harrold, Allen & Dixon, et al.*, No. CV-96-91 (Mobile Cty. Cir. Ct. Jan. 8, 1996).

Plaintiffs appealed to the Seventh Circuit Court of Appeals. A panel of the Seventh Circuit affirmed the district court's dismissal of plaintiffs' complaint under the *Rooker-Feldman* doctrine. According to the panel, "the proper court for an assertion of fraud in the procurement of a judgment is the one which rendered the judgment." A. 11. It reasoned: "if the injury which the federal plaintiff alleges resulted from the state court judgment itself, then *Rooker-Feldman* controls, and the lower federal courts lack jurisdiction over the claim. It does not matter that the state court judgment might be erroneous or even unconstitutional." A. 8. Responding to plaintiffs' argument that, just as any person is not bound by a default judgment entered against him or her by a court without personal jurisdiction, so absent class members are not bound by a judgment entered against them by a court without personal jurisdiction, the panel responded, without further explanation: "We see significant differences between default judgments and the judgment under attack here. We reject the plaintiffs' far-reaching proposed exception to the *Rooker-Feldman* doctrine." A. 10.

Plaintiffs filed a petition for rehearing. At the court of appeals' direction, defendants responded. Three months later, the panel voted to deny the petition for rehearing, and a majority of the active judges of the court voted to deny rehearing *en banc*. A. 35-36. Chief Judge Posner, and Circuit Judges Easterbrook, Manion, Rovner, and Diane P. Wood dissented from the denial of the petition for rehearing *en banc*. A. 36-48.

Judge Easterbrook, writing for the dissenting judges, emphasized the fundamental and irreconcilable conflict between the panel's decision and the decisions of this Court, including *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Hansberry v. Lee*, 311 U.S. 32 (1940), which

hold that "[c]lass members are not bound when a state court exceeds its jurisdiction. . . . Lack of jurisdiction and unconstitutional procedures are recognized grounds for disregarding a judgment in a class action." A. 38. According to the dissenting judges, these constitutional principles apply regardless of whether it is a federal court or a state court that is being asked to disregard an unconstitutional judgment and regardless of whether the unconstitutional judgment was rendered by a state or federal court:

> When *Hansberry v. Lee*, 311 U.S. 32 (1940), held that a judgment rendered without personal jurisdiction over members of the class is not entitled to full faith and credit, the Justices did not add: "except in federal court." . . . [A] judgment that is not entitled to full faith and credit does not acquire extra force via the *Rooker-Feldman* doctrine.

A. 39-40. Judge Easterbrook and the other dissenters also declared that plaintiffs' attorney malpractice claim should not have been dismissed for the additional reason that malpractice claims are "not a collateral attack on a judgment," and thus "[t]he *Rooker-Feldman* doctrine . . . does not apply to malpractice suits." A. 41, 42.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition for the following reasons: (1) to make clear that a judgment entered against a person by a state court without personal jurisdiction is not to be given effect by the federal courts through the *Rooker-Feldman* doctrine; and (2) to resolve a conflict among the circuits about whether class action litigants may, like all other litigants, bring actions for fraud and malpractice against their lawyers. By relying

on the *Rooker-Feldman* doctrine as an absolute bar to consideration of the state court judgment with respect to the plaintiff class, the panel committed a major error of federal law.

The panel's decision upsets basic tenets of our constitutional system. The principle that judgments entered against absent persons by courts without personal jurisdiction are null and void to affect the rights of those persons is as old and as central a principle as exists. The Alabama court lacked jurisdiction over the *Kamilewicz* plaintiffs both because: (1) a state court lacks the power to enter an order depriving non-residents who do not have minimum contacts with the state of their property; and (2) a state court lacks the power to adjudicate the rights of absent class members in the absence of meaningful notice, adequate representation, and, in a damages class action, an opportunity to opt out.

Yet the panel below permitted this very judgment of the Alabama court – a judgment permitting property to be taken from persons by a court they contend lacked personal jurisdiction over them – to operate to close the doors of the federal court. The panel's decision is in conflict with the decisions of this Court, from *Pennoyer v. Neff*, 95 U.S. 714 (1877), through *Hansberry v. Lee*, 311 U.S. 32 (1940), from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and *Johnson v. DeGrandy*, 512 U.S. 997, 114 S. Ct. 2647 (1994). The panel's decision requires federal courts to honor state court judgments entered without personal jurisdiction and without the minimal due process protections that must be provided those absent from state court proceedings. Under the panel's decision, judgments heretofore considered null and void become

powerful enough to extinguish a person's right to petition for relief in federal court.

The panel's decision also creates a conflict among the circuits whether class action litigants are precluded from bringing actions for fraud and malpractice against their lawyers. If the panel is right, then it would follow, as Judge Easterbrook pointed out (A. 42, 47), that *Rooker-Feldman* precludes federal courts from hearing any malpractice case arising out of class actions (and perhaps all actions) in state courts because the details of the state court proceeding would be before the federal courts – a result squarely in conflict with the decisions of other courts of appeals.

The panel's decision thus effectively immunizes class action lawyers in state court from malpractice suits in federal court. And it does so despite the well-documented dangers inherent in class actions, described as follows by Judge Easterbrook:

> Representative plaintiffs and their lawyers may be imperfect agents of the other class members – may even put one over on the court, in a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means it lacks essential information. This possibility, a staple of the literature about class actions, enjoys judicial recognition.

A. 46 (citations omitted).

I. THE PANEL DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT, WITH DECISIONS OF OTHER COURTS OF APPEALS, AND WITH THE CONSTITUTIONAL PRINCIPLE THAT PERSONS CANNOT BE BOUND BY A STATE COURT JUDGMENT ENTERED IN THE ABSENCE OF JURISDICTION OVER THEM.

In essence, the panel elevated the *Rooker-Feldman* doctrine over fundamental principles of due process. Rejecting plaintiffs' arguments that they cannot be bound by a judgment entered by a state court that had no jurisdiction over them, the panel explicitly held that *Rooker-Feldman* applies even if the state court judgment is "unconstitutional." A. 8. In this respect, the panel's decision stands in sharp conflict with the decisions of this Court and with the decisions of other courts of appeals.

A state court has no power to deprive a person of property in the absence of personal jurisdiction over that person. *Pennoyer v. Neff*, 95 U.S. 714 (1877). In both *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the state court unquestionably had personal jurisdiction, a point this Court made explicit in *Rooker* itself. *See Rooker*, 263 U.S. at 415 ("[i]t affirmatively appears from the bill [in equity] that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties"); *id.* at 416 ("[a] reading of the entire bill shows indubitably that there was full jurisdiction in the state courts and that the bill at best is merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of that jurisdiction"). Yet by invoking the *Rooker-Feldman* doctrine, the federal court here refused even to consider the jurisdictional basis of the Alabama judgment.

According to the allegations of the *Kamilewicz* plaintiffs' complaint, the Alabama court had no jurisdiction over them because: (1) a state court cannot, without minimum contacts, deprive absent, out-of-state persons of their property; and (2) the rights of absent class members cannot be determined by a state court judgment entered in the absence of meaningful notice, adequate representation, and an opportunity to opt out. Thus, far from barring the *Kamilewicz* plaintiffs' federal claims, the Alabama judgment cannot bind the *Kamilewicz* plaintiffs in any way and should have been given no effect.

A. A State Court Cannot, Without Minimum Contacts, Deprive Absent, Out-of-State Persons of Their Property.

The *Kamilewicz* plaintiffs and the other potential class members who did not reside in Alabama lacked minimum contacts with Alabama. Accordingly, even if the constitutionally-mandated procedural requirements to asserting jurisdiction over absent class members had been satisfied (and, as discussed below, they were not), the state court could not constitutionally impose a liability on the absent, out-of-state class members. This is precisely what the *Kamilewicz* plaintiffs allege the state court did by ordering money they indisputably owned to be taken out of their own accounts, leaving most, if not all, of them with a net out-of-pocket loss as a result of the Alabama action.

This Court made clear in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that the only reason jurisdiction can be exercised over out-of-state class members without minimum contacts is because they are not being haled into a distant court to defend themselves or to be made subject to counterclaims or damages. *Id.* at 810-12.

In other words, a state court's exercise of personal jurisdiction over out-of-state class members who do not have minimum contacts with the state is predicated on the forum state's not imposing a burden or a liability on them. *Id.* According to this Court, the *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), minimum contacts protection required for a defendant, who is "faced with the full powers of the forum State to render judgment *against* it," *Shutts*, 472 U.S. at 808 (emphasis in original), is unnecessary for a class plaintiff because "[t]he burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant." *Id.*

Here, however, as a result of the alleged deceptive conduct, the Alabama court imposed a liability on most, if not all, of the class members when it required them to pay class counsel an amount that exceeded any benefit they received. For that reason, they became, in essence, defendants in the Alabama action. Significantly, one basis for the district court's holding was its finding that the *Kamilewicz* plaintiffs were "cast in the role of defendants" in the action (A. 30), a finding that the Seventh Circuit concluded "has some support in logic and bolsters a finding of a *Rooker-Feldman* bar." A. 13. *See also* A. 40 (Easterbrook, J., dissenting from denial of petition for rehearing *en banc*) ("[i]n effect, though not in name, this was a defendant class, attempting (unbeknownst to its members) to fend off predatory lawyers' claims to the balances in the escrow accounts").

Under *Shutts*, regardless of the existence or lack of the consent assumed by the procedural protections of notice, representation, and an opportunity to opt out, the state court lacked jurisdiction to deprive persons of their property. In other words, *Shutts* did not authorize state

courts to create out-of-state defendant classes. *See In re Real Estate Title and Settlement Services Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). *See generally* Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L.J. 597, 609 (1987) ("the consent theory of *Shutts* . . . is absolutely unacceptable for defendant class actions").

In sum, because a state court cannot, without minimum contacts, deprive absent, out-of-state persons of their property, the Alabama court lacked jurisdiction over the non-Alabama members of the proposed *Kamilewicz* class and they cannot be bound by the Alabama judgment. Moreover, the Alabama court lacked jurisdiction over the *Kamilewicz* class for the additional reason that, as set forth below, none of the constitutionally-mandated prerequisites to binding absent class members was satisfied here.

B. The Rights of Absent Class Members Cannot Be Determined by a Judgment Entered in the Absence of Meaningful Notice, Adequate Representation, and an Opportunity To Opt Out.

It is a fundamental tenet of American law that every individual is entitled to his or her day in court. Class actions are consistent with this basic principle, but solely because class members may be bound by judgments only when the court had jurisdiction and the class members' due process rights have been protected. *See Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985); *Hansberry v. Lee*, 311 U.S. 32 (1940). In the class action context, the due process inquiry is informed by this Court's holding in *Shutts* that:

"[i]f the forum State wishes to bind an absent plaintiff[4] concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protections," which include "notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel," and "an opportunity [for the absent plaintiff] to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts*, 472 U.S. at 811-12 (citations omitted). Each of these procedural protections is integral to the maintenance of a class action, and, according to the allegations of the complaint, each was lacking in the Alabama action.

The notice to be given to absent class members must be "the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Shutts*, 472 U.S. at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)). *See Notes of Rules Advisory Committee to 1966 Amendments to Rule 23*, 39 F.R.D. 95, 107 (1966) ("[t]his mandatory notice . . . is designed to fulfill

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[4] It is somewhat unclear whether in *Shutts* the Court meant the term "absent plaintiffs" to be synonymous for jurisdictional purposes with out-of-state class members, or, rather, as the term "absent plaintiff" is commonly used, as meaning those class members who are neither named as class representatives nor appear as objectors, regardless of where they reside. *See* 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions*, § 1.16, at 42-44 (3d ed. 1992). Even if the Court meant the former, it would not change the analysis in this case because due process itself insists on more than minimum contacts before a court can divest a person of property: notice and an opportunity to be heard also are constitutionally-mandated prerequisites to depriving persons of their property.

requirements of due process to which the class action procedure is of course subject"). By telling class members falsely that their attorneys would receive not more than one-third of the economic benefit to the class and by not advising class members that most, if not all, of them would suffer a net out-of-pocket loss as a result of the settlement, the notice in the Alabama action fell far short of the constitutional requirements. *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996) (finding notice sent to over 600,000 truck owners deficient because it did not set forth the maximum amount of attorneys' fees sought by class counsel and did not specify the method of calculating attorneys' fees).

Also central to the constitutionality of binding absent class members to a judgment is that "the named plaintiffs at all times adequately represent the interests of the absent class members." *Shutts*, 472 U.S. at 812. This requirement applies equally to class counsel as to the named class representative, *see In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995), and it applies equally to in-state and out-of-state class members, *see Hansberry v. Lee*, 311 U.S. 32 (1940). Only last Term, Justice Ginsburg "stress[ed] . . . the centrality of the procedural due process protection of adequate representation in class action lawsuits, emphatically including those resolved by settlement." *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873, 890 (1996) (Ginsburg, J., concurring in part and dissenting in part). The very essence of the *Kamilewicz* plaintiffs' complaint is that their own attorneys participated in a scheme to defraud them to maximize the attorneys' own fees – an allegation diametrically at odds with the adequate representation requirement.

Finally, without meaningful notice or adequate representation, class members' opt-out rights by definition are violated, for they cannot know what they are choosing to opt in or out of. *See* A. 38 (Easterbrook, J., dissenting from denial of petition for rehearing *en banc*) ("[a] deficient notice means that the class members' right to opt out was defeated, which has jurisdictional consequences of its own"). *See generally* George Rutherglen, *Better Late Than Never: Notice And Opt Out At The Settlement Stage Of Class Actions*, 71 N.Y.U. L. Rev. 258 (1996).

In short, because none of the constitutionally-mandated prerequisites to binding absent class members was satisfied here, the Alabama court lacked jurisdiction and the *Kamilewicz* plaintiffs' right to sue in federal court cannot be extinguished by that judgment. In addition, as next discussed, the *Rooker-Feldman* doctrine is inapplicable for the additional reason that, due to the inadequate representation, the absent class members were essentially non-parties to the Alabama action.

C. Absent Class Members Who Are Not Adequately Represented Are Essentially Non-Parties to an Action.

Because of the fundamental principle that a judgment does not conclude the rights of strangers to the proceeding, *Rooker-Feldman* does not apply to suits by or against persons who were not parties to the initial case. *See Johnson v. DeGrandy*, 512 U.S. 997, 114 S. Ct. 2647 (1994); *see also Leaf v. Supreme Court of Wisconsin*, 979 F.2d 589 (7th Cir. 1992) , *cert. denied*, 508 U.S. 941 (1993); *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973).

In its most recent discussion of *Rooker-Feldman*, this Court held that, despite the fact that a state court had validated a redistricting plan, *Rooker-Feldman* did not bar

the United States from initiating subsequent voting rights litigation based on that plan in federal court because the United States had not been a party to the state case. The Court stated that *Rooker-Feldman* was "inapt" because:

> [U]nlike *Rooker* or *Feldman*, the United States was not a party in the state court. It was in no position to ask this Court to review the state court's judgment and has not directly attacked it in this proceeding. The United States merely seeks to litigate its § 2 case for the first time, and the Government's claims, like those of the private plaintiffs, are properly before the federal courts.

Johnson, 512 U.S. 997, 114 S. Ct. at 2654 (citations omitted). The panel's decision conflicts with *Johnson* because it treats the *Kamilewicz* plaintiffs as parties and penalizes them for failing to appeal the Alabama judgment.

In the class action context, inadequately-represented class members are in effect non-parties. In *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996), this Court unanimously reaffirmed the principle set forth over 50 years ago in *Hansberry v. Lee*, 311 U.S. 32 (1940): it is a violation of due process "to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented." *Richards*, 116 S. Ct. at 1764. Since *Hansberry*, it is clear that absent class members are parties and not strangers to the earlier litigation *only* if they were adequately represented in the earlier proceeding.

It is for this reason that, if they can show that adequate representation was lacking in the first proceeding, absent class members can proceed to relitigate the very matter determined in the first proceeding (and, *a fortiorari*, a related matter, as here), as if they were strangers to the first proceeding. As explained in *Richards*,

"[b]ecause petitioners received neither notice of, nor sufficient representation in, the [earlier] litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property." 116 S. Ct. at 1769; *see also* Restatement (Second) of Judgments § 41 cmt. a (1982) (emphasis added) (if person is inadequately represented, he or she "may avoid being bound *either* by appearing in the action before the rendition of the judgment *or* by attacking the judgment by subsequent proceedings").

Indeed, in the class action context, a due process infirmity such as inadequate notice or inadequate representation makes it virtually impossible for absent class members to launch a challenge to the jurisdiction of the court within the context of the original proceeding. *See Battle v. Liberty Nat. Life Ins. Co.*, 770 F. Supp. 1499, 1512-13 (N.D. Ala. 1991), *aff'd per curiam*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 509 U.S. 906 (1993). Thus, a collateral attack (whether on the judgment, any aspect of the judgment, or any injury flowing from the judgment), in addition to being an absent class member's constitutional right, is often the absent class member's only true option to escape the constitutionally-infirm judgment. In fact, a number of circuits hold that absent class members have no right to appeal a final judgment in a class action unless they are first accorded full rights of intervention. *Gottlieb v. Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992), *cert. denied*, 507 U.S. 908 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988); *Guthrie v. Evans*, 815 F.2d 626, 628 (11th Cir. 1987).

Despite the Alabama court's lack of jurisdiction over the *Kamilewicz* plaintiffs and the fact that they were

essentially non-parties to the Alabama action who could not challenge the Alabama judgment by appeal and *certiorari*, the panel of the Seventh Circuit held that the Alabama judgment precludes federal subject matter jurisdiction. As set forth below, this holding is in direct conflict with this Court's precedent and with that of other courts of appeals.

D. Persons Are Not Bound by a State Court Judgment Entered in Violation of Their Due Process Rights and in the Absence of Jurisdiction Over Them and Can Attack or Seek Damages Based on that Judgment in a Subsequent Proceeding.

The panel's opinion that *Rooker-Feldman* precludes federal subject matter jurisdiction even over a state court judgment obtained without jurisdiction is not supported by either *Rooker* or *Feldman*. The panel's radical new reading of the *Rooker-Feldman* doctrine creates a sweeping exception to this Court's due process jurisprudence, and one of fundamental legal significance: where the judgment of a state is involved, due process stops at the door of the federal courthouse. Such a result is, of course, completely antithetical to the very reason for the establishment of federal courts. *See Burgess v. Seligman*, 107 U.S. 20, 34 (1882) ("the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views"); *see also Barrow Steamship Co. v. Kane*, 170 U.S. 100, 111 (1898).

The panel's elevation of the *Rooker-Feldman* doctrine over constitutional principles is both inconsistent with the decisions of this Court and in direct conflict with the

decisions of other courts of appeals. At its core, the panel's decision means that a judgment that otherwise would not be given full faith and credit because the original court lacked jurisdiction is invulnerable solely because of *Rooker-Feldman*. Put another way, the principles of *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982) ("[a] State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment"), and *Underwriters Nat. Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n.*, 455 U.S. 691, 704 (1982) (quoting *Durfee v. Duke*, 375 U.S. 106, 110 (1963)) ("'[a] judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits – had jurisdiction, that is, to render the judgment'"), apply in every court in this land – except in federal court if the judgment at issue is a state judgment.

However, it has been established at least since *Pennoyer v. Neff*, 95 U.S. 714 (1877), that a person cannot be bound by a state judgment entered in the absence of personal jurisdiction. This is true regardless of whether it is a federal court or a state court in which the validity of the judgment is questioned. *See Pennoyer*, 95 U.S. at 733 (federal courts "are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them").

And it also has been established at least since *Hansberry v. Lee*, 311 U.S. 32 (1940), that an absent class member cannot be bound by (and therefore can collaterally attack) a state court judgment entered in the absence of adequate representation. *See Richards v. Jefferson County*, 116 S. Ct. 1761, 1769 (1996). *See also Matsushita Elec. Indus.*

Co., Ltd. v. Epstein, 116 S. Ct. 873, 888 (1996) (Ginsburg, J., concurring in part and dissenting in part) (citing *Hansberry*, 311 U.S. at 40; Restatement (Second) of Judgments § 42(1)(d) & (e) cmts. e & f (1982)) ("[f]inal judgments . . . remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement"); *In re Real Estate Title and Settlement Services Antitrust Litig.*, 869 F.2d 760, 767-69 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989).

If one cannot be bound by a judgment entered in the absence of jurisdiction, then certainly one cannot be barred under *Rooker-Feldman* from attacking or seeking damages based on that judgment in federal court solely as a result of the existence of the judgment. As Judge Easterbrook emphasized, "[i]t gets the cart before the horse to reject, as barred by a judgment, an effort by the absent class members to show that they were not properly brought into the state case and therefore are not affected by the judgment." A. 45.

This Court's jurisprudence makes evident that *Rooker-Feldman* cannot extend so far. As set forth above, in the very decision that gives the doctrine its name, this Court made clear that the state court had jurisdiction when it entered the judgment. Moreover, in the Court's recent decision in *Matsushita*, despite the fact that the case involved a federal court action attacking the terms on which a state class action had been settled, the Court never once mentioned *Rooker-Feldman*. Rather, the Court simply assumed that federal courts have subject matter jurisdiction over the claims of aggrieved state court absent class members, stating, "[t]o be valid in the rendition forum, and entitled to recognition nationally, a state court's judgment must measure up to the requirements of the Fourteenth Amendment's Due Process Clause." 116 S.

Ct. at 888 (citation omitted). Specifically, although granting full faith and credit to the state court judgment, the majority opinion in *Matsushita* noted that the federal plaintiffs contended that the state court "settlement proceedings did not satisfy due process because the class was inadequately represented . . . in spite of the Chancery Court's express ruling . . . that the class representatives fairly and adequately protected the interests of the class." *Id.* at 880 n.5. The Court concluded, however, that it "need not address the due process claim . . . because it is outside the scope of the question presented in this Court." *Id.* Indeed, the concurring opinion acknowledged that the due process issues remain "open for airing on remand." *Id.* at 890 (Ginsburg, J., concurring in part and dissenting in part).

In addition to being inconsistent with the decisions of this Court, the panel's decision directly conflicts with the decisions of the Fifth Circuit, which expressly has held that *Rooker-Feldman* is no more expansive than full faith and credit and, accordingly, that any attack on a state court judgment that a state court would entertain can be maintained in federal court. In *Gauthier v. Continental Diving Serv., Inc.*, 831 F.2d 559 (5th Cir. 1987), the court, explaining that "*Rooker-Feldman* casts in jurisdictional terms a rule that is very close if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment," "declin[ed] to apply *Rooker-Feldman* in a way that would require a federal court to give greater deference to a state court judgment than a court of the state in which the judgment was rendered would give it." *Id.* at 561. *See also Davis v. Bayless*, 70 F.3d 367, 376 (5th Cir. 1995).

In sum, the petition should be granted because the panel's application of the *Rooker-Feldman* bar to a state

court judgment that would not be given full faith and credit in any other court is at odds with this Court's precedent.

II. THE PANEL DECISION ERECTS A NOVEL BAR TO MALPRACTICE ACTIONS BROUGHT IN FEDERAL COURT AND IS IN CONFLICT WITH OTHER COURTS OF APPEALS ABOUT WHETHER CLASS ACTION LITIGANTS CAN BRING ACTIONS FOR FRAUD AND MALPRACTICE AGAINST THEIR LAWYERS.

The panel held that *Rooker-Feldman* foreclosed not only the *Kamilewicz* plaintiffs' claims against the banks, but also their fraud and malpractice claims against class counsel. In addition to all the reasons set forth above why the panel's decision is both erroneous and in conflict with the decisions of this Court and other courts of appeals, *certiorari* is warranted for an additional reason involving an important question of federal law on which there is a conflict with decisions of other courts of appeals: whether *Rooker-Feldman* precludes class action litigants from bringing actions for fraud and malpractice against their lawyers.

The *Rooker-Feldman* doctrine simply means that federal district courts lack appellate jurisdiction over state courts. If, as the panel held, *Rooker-Feldman* divests a federal district court of jurisdiction over the *Kamilewicz* plaintiffs' fraud and malpractice claims, it can only be because those actions are appellate-like in nature. However, it is settled law (at least in the non-class action context) that a malpractice action is not appellate-like in nature, but rather, as an action for damages for negligence in the first action, is viable only as long as the judgment in the first action is in place. In addition, if fraud and malpractice actions arising out of conduct in

class actions are appellate-like attacks on the original judgment, then a federal district court would be precluded from hearing any such action, whether the underlying proceeding was brought in state or federal court. On this latter point, whether class action litigants can bring fraud and malpractice actions against their lawyers, there is a conflict among the circuits.

Most recently, the Ninth Circuit in *Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996), held directly contrary to the panel's decision. Durkin sued Shea & Gould for breach of fiduciary duty and malpractice in its representation of a defendant company in a class action settlement of a shareholder derivative action. The settlement had been approved under Fed. R. Civ. P. 23 by a federal district court with findings that the notice was "the best notice practicable under the circumstances, . . . the settlement was the product of good faith arm's length negotiations, . . . and the settlement was fair, reasonable and adequate as to the [company] and the [class action plaintiffs]." *Id.* at 1513.

Shea & Gould sought summary judgment, arguing that Durkin should not be permitted to relitigate either the fairness of the settlement or whether the company was adequately represented. *Id.* The trial court rejected that argument, holding that "the prior adjudication of the settlement's adequacy does not collaterally estop a legal malpractice claim challenging the conduct of a party's attorney during the prior action." *Id.* The Ninth Circuit affirmed, emphasizing that the Constitution guarantees a "full and fair opportunity to litigate" and that the issues in the malpractice case were *not* the same as the issues in the class action. *Id.* at 1515-16. It explained, "whether a settlement was 'fair and adequate' for the purposes of Rule 23.1 is not the same issue as whether the settlement

was reasonable in light of alleged malpractice by the participating attorneys." *Id.* at 1516. For that reason, "attorneys are not immunized from malpractice suits simply because they arranged a court-approved settlement." *Id.* at 1518. *See also Bennett v. Gen-Probe, Inc.*, 87 F.3d 1317 (Table), No. 95-55306, 1996 U.S. App. LEXIS 16541 at *3-4 (9th Cir. June 14, 1996) (class member's malpractice action against class counsel did not "endanger or affect the 'fruits and advantages' of the district court's judgment in settling the underlying class action" and so there was no procedural impropriety in "examin[ing] the adequacy of the class settlement . . . insofar as that settlement sheds light on [counsel's] representation of [plaintiff]"), *petition for cert. filed*, 65 U.S.L.W 3354 (U.S. Oct. 28, 1996) (No. 96-678).

The Third Circuit also has held that a Rule 23 class member may have a malpractice claim against class counsel. *Zimmer Paper Products, Inc. v. Berger & Montague*, 758 F.2d 86 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985). And the Eleventh Circuit has stated that it is "unprepared to declare as a matter of law that counsel in a class action suit has no professional obligations except those set out by Rule 23." *Diaz v. Sheppard*, 85 F.3d 1502, 1506 n.5 (11th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3468 (U.S. Dec. 20, 1996) (No. 96-1004). *See also Peters v. National Railroad Passenger Corp.*, 966 F.2d 1483, 1487 n.3 (D.C. Cir. 1992); *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 231 Conn. 168, 646 A.2d 195, 199-201 (1994). *Cf. Derrickson v. City of Danville*, 845 F.2d 715, 721 (7th Cir. 1988) (explaining that claim preclusion does not apply to wrongs committed in connection with settling a class action suit, because they did "not grow out of the same 'transaction or occurrence' as the [class action suit itself]").

On the other hand, the panel decision finds support in earlier decisions of the Fifth and Sixth Circuits that regard court approval of the adequacy of a class action settlement under Rule 23 as precluding a subsequent malpractice claim. *See Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982); *Laskey v. UAW*, 638 F.2d 954 (6th Cir. 1981). These cases demonstrate the conflict among the circuits requiring resolution by this Court.

The panel opinion brings into question the viability of all future fraud and malpractice actions against class counsel. In fact, the import of the opinion is to foreclose any federal action (assuming the existence of federal question or diversity jurisdiction) for fraud or attorney malpractice occurring in a state court class action and to insulate counsel involved in the state court class action from malpractice liability, even in the most nefarious of circumstances. As the dissenting judges emphasized: "If the panel is right, no malpractice suit growing out of state litigation in which the judge awarded attorneys' fees – maybe no malpractice suit, period – may be brought in federal court, even if all requirements of the diversity jurisdiction have been satisfied." A. 42.

The petition should be granted to make clear that malpractice and fraud actions brought against lawyers are independent actions and not appellate matters in the federal courts, and to resolve the conflict among the circuits about whether class action litigants, like any other litigants, may bring actions for fraud and malpractice against their lawyers.

CONCLUSION

The Seventh Circuit's decision is inconsistent with the long-standing precedent of this Court and is in conflict with the decisions of other courts of appeals. This petition should be granted to make clear that a judgment entered against a person by a state court without personal jurisdiction is not to be given effect in the federal courts through the *Rooker-Feldman* doctrine, and to resolve a conflict among the circuits about whether class action litigants may, like any other litigants, bring actions for fraud and malpractice against their lawyers.

Respectfully submitted,

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Dated: January 23, 1997

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IN THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96-1019

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Defendants-Appellees.

Appeal From The United States District Court For The Northern District Of Illinois, Eastern Division.
No. 95 C 6341 - Paul E. Plunkett, *Judge*

ARGUED June 3, 1996 - DECIDED August 8, 1996

OPINION OF THE COURT

Before CUMMINGS, RIPPLE, and EVANS, Circuit Judges.

TERENCE T. EVANS, Circuit Judge.

A class action in Alabama cost Dexter Kamilewicz $91.33 in attorney fees to recover $2.19 on the merits. When he learned of this news, he and the other plaintiffs (his wife and Martha Preston) sued the class action attorneys (as well as certain defendants in the Alabama action) in the District Court for the Northern District of Illinois. There, to add to their chagrin, they ran up against another obstacle—the *Rooker-Feldman* doctrine. This is their appeal from an order dismissing their federal case for lack of subject matter jurisdiction.

Kamilewicz and the other plaintiffs have had mortgages serviced by BancBoston Mortgage Corporation, one of the defendants. They were among an estimated 715,-000 members of a class in a nationwide class action filed in the circuit court for Mobile County, Alabama. The suit—*Hoffman, et al. v. BancBoston Mortgage Corp.*—challenged the manner in which BancBoston calculated the amount of surplus each member of the class was required to maintain in their escrow accounts. Deposits to the

escrow accounts were paid as part of the class members' monthly mortgage payments. There was no question regarding the ultimate ownership of the surplus; it belonged to the mortgagor and was to be returned when the mortgage debt was satisfied. The issue in the lawsuit was the propriety of BancBoston's holding the surplus until the time it would be returned to the mortgagor.

In October 1993, the Alabama court granted partial summary judgment in favor of the plaintiff class. The court found that BancBoston's practice was, in fact, inconsistent with the terms of the mortgages. Then in October 1995, counsel for the class prepared a notice of a proposed settlement of the suit. The notice stated that the settlement was "fair, reasonable, adequate, and in the best interests of the class" and that the attorney fees sought were "reasonable" and would "not exceed one-third of the economic benefit" to the class. Bank of Boston—one of the defendants—objected to the notice because it failed to advise the class that there were "substantial adverse effects," to the proposed settlement.

Those perceived adverse effects were that if BancBoston were ordered to refund the escrow surplus and if the attorneys for the class were to seek attorney fees out of the refund, some class members would suffer an out-of-pocket loss as a result of the lawsuit. It should be noted here that the

Bank of Boston and BancBoston had offered, prior to the grant of partial summary judgment in 1993, to settle the litigation. As part of that proposed settlement, the bank and BancBoston would have had to pay $500,000 in attorney fees out of the banks' own funds, and the entire amount of the escrow refund would have gone to the class members.

Nevertheless, the Alabama court approved the proposed notice and held a fairness hearing on January 10 and 11, 1994. On January 24, 1994, the court approved the settlement under which the class members received one-time interest payments ranging from $0.00 to $8.76. The court also found the attorney fees reasonable. The fee award was a percentage of the escrow accounts, or, the complaint in the present case asserts, in excess of $14 million. The fact may be that the award was closer to $8,500,000, but because in either event we are talking about significant amounts of money, the actual amount is not material and, of course, the allegations of the complaint are accepted as true at this point in the litigation. Under the settlement, BancBoston deducted attorney fees from the class members' escrow accounts. The deduction was recorded on the 1994 annual tax and interest statements as a "miscellaneous disbursement." In most cases, the "miscellaneous disbursement" was more—far more—than the interest refund. It was this statement that, understandably, caught Mr. Kamilewicz's eye.

Unhappy with the peculiar result of the class action suit in Alabama, Mr. and Mrs. Kamilewicz and Ms. Preston filed the present federal class action against the bank and the mortgage company, and the plaintiffs' attorneys in the Alabama action. The complaint contained allegations of violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, and of the Civil Rights Act, 42 U.S.C. § 1983, as well as claims of common law fraud, negligent misrepresentation, attorney malpractice, breach of fiduciary duty, and conversion. In turn, the defendants in the federal case filed a motion with the Alabama court seeking an order directed to the Kamilewicz plaintiffs to show cause why they were not bound by the January 1994 order of that court. A hearing was scheduled in Alabama, to which the Kamilewicz plaintiffs sent an attorney for the purpose of stating that they would not participate in the hearing because they contested whether Alabama had personal jurisdiction over them. On January 30, 1996, the Alabama court reaffirmed the order of settlement.

Meanwhile, back in Chicago, on December 15, 1995, Judge Paul Plunkett of the Northern District of Illinois, had entered his order dismissing the federal case for lack of subject matter jurisdiction. He found that even though the federal case was "dressed up" as a claim for RICO damages or

for attorney malpractice, it was, nevertheless, a collateral attack on a state court judgment which would require that he consider issues "inextricably intertwined" with the state court case. This he was prohibited to do, he concluded, under the doctrine known as *Rooker-Feldman.*

We review *de novo* his decision on a motion to dismiss the complaint, taking all well-pleaded allegations as true, and we draw all reasonable inferences in the plaintiffs' favor. *Deveraux v. City of Chicago,* 14 F.3d 328 (7th Cir.1994); *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227 (7th Cir.1993). Having performed those tasks, we find ourselves in agreement with the district court.

We first note that the exact ground on which the plaintiffs and, for that matter, the Amici, who are attorneys general from several states, stand in this appeal is a little like shifting sand. The plaintiffs argue that the judgment of the Alabama court is null and void because the court did not have personal jurisdiction over them and that the special protections required for class actions—notice, adequate representation, etc.—were not complied with. However, they also say that they are not seeking to overturn the Alabama judgment. Then, they state that where the district court went wrong was to use a state court judgment which was "null and void" as the basis for the *Rooker-Feldman* bar. In addition, plaintiffs veer into

a claim that the January 30, 1996, Alabama court order cannot be a basis for the *Rooker-Feldman* bar because there was no personal jurisdiction over them, and furthermore that fraud claims are somehow outside the *Rooker-Feldman* bar. The Amici say that they do not want to establish an exception to the general rule that absent class members may be bound by a nationwide class action settlement, but that on the unusual—and egregious—facts of this case, the Kamilewicz action should be allowed to proceed.

The *Rooker-Feldman* doctrine grows out of two Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). At its core, the doctrine is a recognition of the principle that the inferior federal courts generally do not have the power to exercise appellate review over state court decisions. In *Rooker,* the Supreme Court stated that because the jurisdiction of the federal district court was strictly original, those courts cannot reverse or modify a state court judgment-even if that judgment is wrong. Only the Supreme Court has that power. *Feldman* involved proceedings denying him a waiver of a bar admission rule which required that applicants have graduated from an approved law school. The first issue was whether the action constituted a judicial proceeding. The Court determined that

it was in fact such a proceeding and that a district court "has no authority to review final judgment of a state court in judicial proceedings." At 482, 103 S.Ct. at 1315.

It becomes necessary to our analysis, then, to determine whether what the federal court was asked to do in this case was, essentially, review a decision of a state court. Our cases offer means by which that determination is made. We ask whether the federal plaintiff seeks to set aside a state court judgment or whether he is, in fact, presenting an independent claim. *GASH Associates v. Village of Rosemont, Illinois,* 995 F.2d 726 (7th Cir.1993). Put another way, if the injury which the federal plaintiff alleges resulted from the state court judgment itself, then *Rooker-Feldman* controls, and the lower federal courts lack jurisdiction over the claim. It does not matter that the state court judgment might be erroneous or even unconstitutional. Nor does it matter that the time for appeal to the United States Supreme Court may have passed. *Garry v. Geils*, 82 F.3d 1362 (7th Cir.1996).

In addition, the state and federal cases also do not need to be directly on point. The Court found a lack of jurisdiction in *Feldman* itself when the federal constitutional claims were "inextricably intertwined," at 486, 103 S.Ct. at 1316-17, with the state court judgment. As we have explained, lower federal courts might be engaging in impermissible appellate review

even when asked to entertain a claim that was not argued in the state court but was "inextricably intertwined" with the state court judgment. *Ritter v. Ross,* 992 F.2d 750 (7th Cir.1993), *cert. denied,* 510 U.S. 1046, 114 S.Ct. 694, 126 L.Ed.2d 661 (1994).

Our cases have attempted to make the analysis of this issue easier by offering a sometimes helpful tip. That tip is that often, if a federal plaintiff was the plaintiff in the state court action, the doctrine he must contend with is res judicata, not *Rooker-Feldman.* On the other hand, if the federal plaintiff was the defendant in state court, *Rooker-Feldman* is the applicable doctrine. *Homola v. McNamara,* 59 F.3d 647 (7th Cir.1995); *Nesses v. Shepard,* 68 F.3d 1003 (7th Cir.1995). The tip, however, is merely that, and allows exceptions. As we pointed out in *Garry,* both the *Rooker* and *Feldman* plaintiffs were also plaintiffs in the state judicial proceedings. Although it may be that the federal plaintiff's position as either a plaintiff or a defendant in the state court proceeding will "usually coalesce with the source-of-the-injury standard," as we said in *Garry,* it may not always do so, and the important issue remains the source of the injury: the issue is whether the federal plaintiff is injured by the state court judgment or by a prior injury at the hands of the defendant.

How does all of this theory apply to the case before us? As a preliminary matter, we note that the Alabama court specifically found the settlement to be fair and approved the fees. In his order of January 24, 1994, the state judge found that the notice complied with all requirements of due process, that the consent decree was fair and reasonable, and that the attorney fees were reasonable.

Plaintiffs seem to be urging us to reach the conclusion that we can overturn the decision of the Alabama court insofar as it involved a determination that procedural due process was complied with. As support for this proposition, they rely on decisions which hold that a party can attack a *default* judgment against him if it is entered by a court without personal jurisdiction over him. We see significant differences between default judgments and the judgment under attack here. We reject the plaintiffs' far-reaching proposed exception to the *Rooker-Feldman* doctrine.

Another argument which seems slightly off-center is that the January 30, 1996, order, finding the allegations of fraud "baseless," is not subject to a *Rooker-Feldman* bar because it was entered in the absence of personal jurisdiction over the plaintiffs and it was entered after the federal lawsuit was filed. This argument is tied to the claim that plaintiffs were precluded from litigating their fraud claim in the state

court, and thus were required to—or had a right to—litigate it in federal court.

The January 30 order itself is not material to the issues before us. It is not necessary to rely on it to determine that the federal lawsuit was properly dismissed. The fact is that the proper court for an assertion of fraud in the procurement of a judgment is the one which rendered the judgment. As we stated in *Homola*, at 650:

> Relief in civil cases differs from that in criminal cases in two principal respects. First, the civil time limits are shorter (in federal litigation, for example, a claim of fraud on the court, *Homola*'s theme, must be made within one year, Fed.R.Civ.P. 60(b)(3)). Second, the losing party cannot move to a new forum but must present his argument to the court that rendered the judgment. See *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700 (7th Cir.1987). *Homola* has tried to shift not only courts but also jurisdictions, asking a federal judge to award relief for wrongs committed in state court. Instead of saying that there was no constitutional flaw in the state proceedings, the district court should have refused to entertain the claims, sending Homola back where he belongs—the original courts.

Alabama has a procedure by which a litigant can assert an independent action for fraud upon the court within three years of the entry of the fraudulently induced judgment. Alabama Rule of Civil Procedure 60(b). In addition, the Alabama court retained continuing jurisdiction over the class action. It is not for the federal court to decide these issues.

We are dismayed by the plaintiffs' reliance on *Derrickson v. City of Danville*, 845 F.2d 715 (7th Cir.1988), and *In re VMS Securities Litigation*, 156 F.R.D. 635 (N.D. Ill.1994), for any proposition regarding the *Rooker-Feldman* doctrine or the fraud allegations. In *Derrickson,* a *federal* class action settlement was approved. Then the state's attorney for Vermillion County, Illinois, opened a *criminal* investigation. The question before us was whether claim preclusion barred the criminal proceedings in state court, not, obviously, a *Rooker-Feldman* bar. Plaintiffs, in a footnote, acknowledge a problem using this case as authority for their argument as "it involved a state action following federal approval of a consent decree. . . ." We wholeheartedly agree. Similarly in *VMS,* the prior judgment was an approval of a settlement in a federal class action. The issues were whether certain subsequent state court actions could proceed. Use of either of these cases for the proposition that in the present suit,

the *Rooker-Feldman* doctrine does not present a bar is disingenuous, at best.

The Kamilewiczes were class member/plaintiffs in the Alabama suit. The part of the judgment they are unhappy with is the approval of the settlement as to the fees to be paid to their attorneys—fees which were assessed against them. The district court concluded that the *Kamilewicz* plaintiffs were in the position of defendants in this aspect of the state court proceedings. That conclusion has some support in logic and bolsters a finding of a *Rooker-Feldman* bar. More important, however, is the fact that the plaintiffs' injuries are a result of the state court judgment. Their claim in federal court is a multi-pronged attack on the approval of the settlement regarding the attorney fees issue. Regardless of which of the specific federal claims the district court were to consider, it would run directly into the state court finding, entered after a two-day fairness hearing—that the fees were reasonable. The federal claims are "inextricably intertwined" with the state court judgment, whether that judgment is right or wrong.

We won't deny that the Alabama judgment seems questionable on the surface. How can it be right that a plaintiff should recover less than $10 and have to pay nearly $100 in fees? But how can we—or the district court—know that we would have ruled another way? To determine that, we

would have to go through the steps already taken in the state court—precisely what lower federal courts are not allowed to do under *Rooker-Feldman.* And perhaps if we undertook that analysis we would find that some less tangible economic benefit to the class justified the settlement.

That the facts seem at least superficially egregious brings us to the arguments of Amici that on facts such as these an exception of some undefined sort should be carved out, and that if the plaintiff class was actually in the position of defendants on the attorney fees issue, then even under *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), perhaps personal jurisdiction was lacking in the Alabama court. We decline to take the step urged by the Amici.

In *Shutts*, the Court loosened somewhat the requirements for assertion of personal jurisdiction over members of a plaintiff class and determined that due process would be satisfied if there was notice, an opportunity to appear in person or by counsel, an opportunity to opt out of the class, and adequate representation. The rationale was, in part, that absent plaintiffs ordinarily do not face the same exposure as defendants. Amici argue that if on the attorney fees issue the *Kamilewicz* plaintiffs were actually in the position of defendants, then due process requires that issues of

personal jurisdiction be assessed under the traditional minimum contacts analysis of *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

Even were we to accept the argument, it does not change the fact that lower federal courts cannot review decisions of the state court. Here, the state court approved the settlement, including the fees. The Supreme Court of Alabama or the United States Supreme Court could reverse the decision were either so inclined. The federal district court, on the other hand, cannot review the Alabama decision. We also note the obvious—that the posture of the Alabama case is not unique. In class actions, often the fees are a percentage of the award granted to the plaintiff class. The argument of Amici, if accepted, could have ramifications far beyond this case.

Because we agree that *Rooker-Feldman* bars this action, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	
v.	:	No. 95 C 8341
BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,	:	**MEMORANDUM OPINION AND ORDER**
Defendants.	:	(Filed December 15, 1995)

PLUNKETT, District Judge.

This case is before the Court on the motion to dismiss of defendants Edelman & Combs and Daniel A. Edelman, in which all defendants except John or Jane Does 1 through 50 have joined. For the reasons set forth below, we grant the motion, and we dismiss this case for lack of subject matter jurisdiction.

BACKGROUND

The plaintiffs, Dexter J. Kamilewicz and Gretchen L. Kamilewicz, who reside in Maine, and Martha E. Preston, who resides in Wisconsin, have (or had) mortgages serviced by defendant BancBoston Mortgage Corporation ("BancBoston"). They were among the estimated 715,000 members of the plaintiff class in a nationwide class action challenging the manner in which BancBoston calculated the amount of escrow surplus each of its mortgage holders was required to maintain. The class action, *Hoffman, et al, v. BancBoston Mortgage Corp., et al.* (the "*Hoffman* litigation"), was filed in the Circuit Court of Mobile County, Alabama, in May 1991.

In the *Hoffman* litigation, the central issue was whether BancBoston overcharged mortgage holders whose mortgages it serviced so that a surplus existed in each mortgage holders'

escrow account. The ownership of the surplus was not in dispute in that case; the surplus belonged to the mortgage holders and was to be returned to them when their mortgages terminated. Rather, the complaint in the *Hoffman* litigation alleged that BancBoston's actual practice required deposits by the mortgage holders, through their monthly mortgage payments, that created and maintained substantial escrow surpluses, and that BancBoston's actual practice did not conform to the terms of the plaintiff class' mortgages relating to escrow surplus.

The remaining defendants in this case were either defendants in the *Hoffman* litigation or were attorneys representing one of the parties there. Bank of Boston Corporation ("Bank of Boston"), a defendant here, was also a defendant in the *Hoffman* litigation. It were [sic] represented in that case, along with BancBoston, by defendant Burr & Forman, an Alabama law firm, and defendant attorney T. Thomas Cottingham of that firm. The plaintiff class in the *Hoffman* litigation was represented by defendants Ezell & Sharbrough, an Alabama law firm, defendant attorneys Mark Ezell and John W. Sharbrough, III of that firm, defendant law firm Edelman & Combs of Chicago, and defendant attorney Daniel A. Edelman, defendant law firm Lawrence Walner & Associates of Chicago, and defendant attorney Lawrence

Walner (collectively, the "*Hoffman* class counsel defendants").

In October 1993, the Alabama court granted partial summary judgment in favor of the plaintiff class on the grounds that BancBoston's practice was inconsistent with the terms of the mortgages. Pursuant to an order entered by the Alabama court on October 12, 1995, the *Hoffman* class counsel defendants prepared a notice of proposed settlement to be sent to the plaintiff class, in which they represented that the settlement was "fair, reasonable, adequate, and in the best interests of the class," and that the attorneys' fees they sought were "reasonable." (Compl., ¶ 67.) Bank of Boston and BancBoston filed objections to the proposed notice shortly thereafter, asserting that it wad [sic] misleading to the plaintiff class because it failed to inform them that there [sic] "substantial adverse effects" to the proposed settlement, including, among other things, that if the Alabama court ordered BancBoston to refund the escrow surplus, and if the *Hoffman* class counsel defendants sought attorneys' fees out of that refund, then the plaintiff class would suffer an actual out-of-pocket loss as a result of the lawsuit.[1] (Compl., ¶ 70.)

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[1] According to the complaint, the objections to the proposed notice were apparently withdrawn as moot. (Compl., ¶ 69.)

The plaintiffs here allege that before the Alabama court granted partial summary judgment, Bank of Boston and BancBoston had offered to settle the *Hoffman* litigation in a manner which would have required them to pay $500,000 to the *Hoffman* class counsel defendants as attorneys' fees, so that the entire escrow refund would have been returned to the plaintiff class. The *Hoffman* class counsel defendants allegedly refused that settlement, insisting both that the amount of the attorneys' fees they recovered should be significantly higher, and that the fees should be taken from the individual escrow accounts of the plaintiff class, not from the escrow refund.

The *Hoffman* litigation settled in principle in November 1993. The terms of the settlement, later memorialized in a consent decree, were, in pertinent part:

(1) BancBoston agreed to change its method of escrow account analysis, which reduced the amount of escrow funds it could hold by approximately 19%;

(2) the plaintiff class members would receive one-time interest payments ranging from $0.00 to $8.76; and

(3) the plaintiff class members would receive a refund of the excess escrow funds, from which the attorneys'

fees for the class *Hoffman* counsel defendants would be deducted.

The plaintiffs here allege that the true economic benefit to the plaintiff class in the *Hoffman* litigation was only the interest payment; that is, the value of receiving the escrow surplus now rather than receiving it when the mortgage terminated. However, they allege that the *Hoffman* class counsel defendants misled the Alabama court by convincing it that the economic benefit to the plaintiff class was the entire escrow surplus, which they allegedly did in order to increase the award of attorneys' fees. The *Hoffman* class counsel defendants were allegedly awarded fees as a percentage of that surplus, despite the fact that this money had always belonged to the plaintiff class; specifically, they allegedly received as fees 28% of the total escrow surplus, or an amount in excess of $14,000,000.[2]

The plaintiffs allege that all the defendants here deliberately omitted from the consent decree (submitted to the

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[2] At oral argument held on December 5, 1995, counsel for defendants Edelman & Combs and Daniel A. Edelman asserted that the actual fee award was closer to $8,000,000. However, this dispute of fact is not relevant to our subject matter jurisdiction, and therefore, on this motion to dismiss, we take the allegations in the complaint as true. *See infra* at 9.

Alabama court) and from the notice of hearing on proposed settlement of class action (sent to the plaintiff class) any mention of the fact that the settlement would result in an out-of-pocket loss to most members of the plaintiff class, and that the attorneys' fees awarded to the *Hoffman* class counsel defendants exceeded 28% of the true economic benefit to the plaintiff class. The plaintiffs also allege that the notice of hearing on proposed settlement of class action filed with the Alabama court by the *Hoffman* class counsel defendants, which was twelve single-spaced pages, contained the following material misrepresentations:

(1) that the settlement was fair, reasonable. adequate, and in the best interests of the class, when it was not;

(2) that by participating in the class, members of the class would receive monetary distributions, when in fact most class members would suffer an out-of-pocket loss; and

(3) that the *Hoffman* class counsel defendants would request attorneys' fees which would not exceed one-third of the "economic benefit" to the plaintiff class, without disclosing that the "economic benefit" referred to was the entire escrow surplus, which already belonged to the plaintiffs.

The plaintiffs further allege that the defendants knew that if they clearly informed the plaintiff class of the ramifications of the proposed settlement in the *Hoffman* litigation, most of the plaintiff class would opt out of the class.

The proposed notice was approved by the Alabama court on December 6, 1993, and it was sent to approximately 415,000 class members at their last known addresses on December 9 and 10, 1993. In addition, a copy of the notice was published in *USA Today* on December 13 and 20, 1993. Only 1,500 members of the plaintiff class opted out, and it is alleged that many may have done so by mistake because they did not understand the notice.

On January 10 and 11, 1994, the Alabama court held a fairness hearing regarding the proposed settlement. The defendants testified and presented expert testimony that the economic benefit to the class was at least equivalent to the amount of the escrow surplus to be refunded to the members of the plaintiff class, not the value of receiving that escrow surplus now rather than later. The plaintiffs allege that the Alabama court was never informed that the settlement would result in an out-of-pocket loss to almost all members of the plaintiff class. The Alabama court approved the settlement,

finding the attorneys' fees reasonable in light of fees awarded in other cases, on January 24, 1994.

Pursuant to the settlement of the *Hoffman* litigation, from about May 1994 through the end of that year, BancBoston deducted attorneys' fees from the plaintiff class members' escrow accounts in the amount of 5.32% of the account balance. In January 1995, BancBoston sent 1994 Annual Tax and Interest Statements to each of its mortgage holders, on which the deduction for attorneys' fees was listed only as a "miscellaneous disbursement." (Compl., ¶ 105(d).) The plaintiffs allege that this misleading label was applied as a further effort to deceive the members of the plaintiff class regarding the amount of attorneys' fees, and the manner of their payment, awarded to the *Hoffman* class counsel defendants.

The plaintiffs filed this action on November 2, 1995. They have asserted a claim under section 1962(c) of RICO, 18 U.S.C. § 1962(c), against all defendants (Count I); a claim under section 1962(d) of RICO against all defendants (Count II); a civil rights claim under section 1983, 42 U.S.C. § 1983, against the *Hoffman* class counsel defendants (Count III); a common law fraud claim against all defendants (Count IV) ; a common law fraudulent concealment claim against all defendants (Count V); a negligent misrepresentation claim

against all defendants (Count VI); a claim of attorney malpractice against the *Hoffman* class counsel defendants (Count VII); a claim of breach of fiduciary duty against the *Hoffman* class counsel defendants (Count VIII); a claim of conversion against Bank of Boston and BancBoston (Count IX); and a claim of breach of fiduciary duty against Bank of Boston and BancBoston (Count X). They seek treble damages on the RICO claims, and either compensatory damages alone, or both compensatory and punitive damages, on the remaining claims. The plaintiffs have filed this as a class action. We have both federal question and diversity jurisdiction.

After this motion to dismiss was filed, but before it had been fully briefed and decided, defendant John W. Sharbrough III filed, on behalf of the *Hoffman* class counsel defendants, a motion in the *Hoffman* litigation requesting that the Alabama court order the plaintiffs in this case to show cause why they should not be bound by the settlement agreement in that case (the "*Hoffman* motion"). That motion also requested, although without discussion, that sanctions be imposed on the plaintiffs in this case, presumably for filing this action. Subsequently, the plaintiffs here filed an emergency motion for a temporary restraining order, asking this Court to enjoin the *Hoffman* class counsel defendants from pursuing the *Hoffman* motion. Defendants Edelman & Combs and Daniel A. Edelman filed a written response to the emergency motion.

We were informed at the December 5, 1995 hearing on the plaintiffs' emergency motion that the day before, the Alabama court had granted the *Hoffman* motion on an *ex parte* basis and had ordered the plaintiffs in this case to appear in Alabama on December 18, 1995, at which time they would be given an opportunity to present evidence and testimony in support of their allegations challenging the Alabama court's final order in the *Hoffman* litigation. We ordered the parties in this case to complete the briefing on the motion to dismiss because we could not reach the issues raised in the plaintiffs' emergency motion for a temporary restraining order until we determined that we had subject matter jurisdiction over this case.

DISCUSSION

On a motion to dismiss for lack of subject matter jurisdiction under Rule 12 (b) (1) of the Federal Rules of Civil Procedure, we must take all well-pleaded allegations in the complaint as true and draw all reasonable inferences therefrom in favor of the plaintiff. *Rueth v. United States Envtl. Protection Agency,* 13 F.3d 227, 229 (7th Cir. 1994).

The moving defendants have raised a number of issues in their motion to dismiss. They assert that this Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine, that the plaintiffs' claims are barred by res judicata

and collateral estoppel, that the plaintiffs have failed to state RICO claims because they have not adequately alleged either an enterprise or a pattern, that they have failed to state a section 1983 claim because none of the defendants were state actors, and that all of the common law claims fail because they are based on statements made in the course of adverse legal proceedings.

We consider first the issue of whether, under the *Rooker-Feldman* doctrine, we lack subject matter jurisdiction over the plaintiffs' claims, for, if that is true, we must dismiss this case without taking action on the pending motions. The *Rooker-Feldman* doctrine, set out in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), "teaches that the Supreme Court of the United States is the only federal court that has jurisdiction to review the decision of a state court..." *Hoover v. Wagner,* 47 F.3d 845, 849 (7th Cir. 1995). Its boundaries, and the line separating it from res judicata, are less than precise. On two of its most recent decisions addressing the issue, the Seventh Circuit has clarified that the distinction between *Rooker-Feldman* and res judicata lies in the role occupied by the federal plaintiff in state court proceedings, explaining:

> [The *Rooker-Feldman* doctrine] ought to be confined to cases in which the *defendant* in the state court is seeking to undo a remedial order of some sort (ordinarily a criminal conviction or an injunction). That is unmistakably a collateral attack on the state court's judgment. When a *plaintiff* seeks to relitigate a suit that has been decided against him, he is not so much attacking as trying to bypass the judgment in that suit; and the doctrine that blocks him is res judicata.

Nesses v. Shepard, 68 F.3d 1003, 1004 (7th Cir. 1995) (emphasis added). Putting it another way,

> A plaintiff who loses and tries again encounters the law of preclusion. The second complaint shows that the plaintiff wants to ignore rather than upset the judgment of the state tribunal. A *defendant* who has lost in state court and sues in federal court does not assert injury at the hands of his adversary; he asserts injury at the hands of the court, and the second suit therefore is an effort to obtain collateral review. It must be dismissed not on the basis of preclusion but for lack of

> jurisdiction. This is the effect of the *Rooker-Feldman* doctrine . . . .

Homola v. McNamara, 59 F.3d 647, 650 (7th Cir. 1995) (emphasis in original). The analysis does not stop there, however. Where a federal plaintiff raises an independent claim, "albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party," then *Rooker-Feldman* does not bar the federal action. *GASH Assoc. v. Village of Rosemont,* 995 F.2d 726, 728 (7th Cir. 1995).

Thus, whether the *Rooker-Feldman* doctrine requires us to dismiss this case turns on the role which the plaintiffs here occupied in the *Hoffman* litigation. If we conclude that the plaintiffs here were in the role of plaintiffs on the issue of attorneys' fees in the *Hoffman* litigation, *Rooker-Feldman* clearly has no application. In that case, we have subject matter jurisdiction to consider both the remaining issues raised in the motion to dismiss and the issues raised in the plaintiffs' emergency motion for a temporary restraining order.

While, in many circumstances, the question of the role a litigant occupied in prior litigation may be easily answered, in this case it is complicated by the inherently adversarial nature of the relationship between a plaintiff class and class

counsel in a class action on the issue of attorneys' fees. The *Hoffman* class counsel defendants were in an adversarial position to their clients at the fairness hearing in the *Hoffman* litigation regarding their fees. (Defs.' Br. at 7.) Thus, the fact that the plaintiffs here were members of the plaintiff class is not dispositive of the *Rooker-Feldman* issue; they were also in an adversarial position to their attorneys over the attorneys' fees. And, we think, their position was a defensive one. On the fee issue, the *Hoffman* class counsel defendants were in the role of plaintiffs, for they were asking the Alabama court for certain affirmative relief, namely, an award of fees calculated in a particular manner. The plaintiffs here, in contrast, were cast in the role of defendants, for they had no obligation to put forth any evidence on the issue, but were entitled to present objections and cross-examine the witnesses presented by the *Hoffman* class counsel defendants. Moreover, the final judgment regarding attorneys' fees obligated them to pay money to the *Hoffman* class counsel defendants. Thus, because we have concluded that these plaintiffs were in the role of defendants vis-a-vis the *Hoffman* class counsel defendants on the issue of attorneys' fees, the *Rooker-Feldman* doctrine could bar this action.

We must next determine whether the plaintiffs here seek to collaterally attack the judgment of the Alabama court in the *Hoffman* litigation or whether they have asserted an

independent claim. It is alleged that the Alabama court decided both the issues of the economic benefit to the plaintiff class and the reasonableness of the attorneys' fees awarded to the *Hoffman* class counsel defendants. The gist of the plaintiffs' claims here is that the Alabama court reached the wrong decision as a result of the fraud perpetrated upon it and the plaintiff class by these defendants.

Even though their request for relief is dressed up as damages under RICO, section 1983, or for attorney malpractice, the plaintiffs are asking us to undo what the Alabama court did, and that constitutes a [sic] impermissible collateral attack upon the state court judgment. The *Rooker-Feldman* doctrine bars federal suits where, although the claims were not argued in the state court proceedings, they are "inextricably intertwined" with the state court judgment. *Wright v. Tackett,* 39 F.3d 155, 157 (7th Cir. 1994). If we were to address the merits of the plaintiffs claims, we would have to re-examine documents filed with and approved by the Alabama court, such as the notice of proposed settlement, and we would have to re-open, in effect, the Alabama court's decision regarding the economic benefit to the class and the reasonableness of the award of attorneys' fees. The *Rooker-Feldman* doctrine prohibits us from doing any of this, and, hence, we lack subject matter jurisdiction over the plaintiffs' claims.

The plaintiffs argue that fraud is an exception to *Rooker-Feldman,* and that the fraud in the *Hoffman* litigation "so permeated" that case that it "disabled the state court judge from rendering a fair or independent judgment." (Pls.' Br. at 7.) They suggest, by this, that the state court was biased against them as a result of the fraud, and that fairness requires that they now be given a federal forum for their claims (presumably because the Alabama court would not be fair to them now).[3] This makes little sense. If the defendants did perpetrate a fraud upon the Alabama court, as the plaintiffs have alleged, then the state court was an innocent victim of it; that is a far cry from being prejudiced against the plaintiffs. Moreover, if the plaintiffs address their concerns to the Alabama court now and can substantiate their claims, that court is likely to be outraged by the defendants' conduct.

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[3] In support of their emergency motion for a temporary restraining order, the plaintiffs cast the Alabama court's December 4, 1995, order granting the *Hoffman* motion in part and scheduling a hearing on the plaintiffs' claim of fraud for December 18, 1995, in a sinister light, an indication that the Alabama court will do them harm. We do not think this interpretation is a fair reading of the December 4 order. There is nothing improper about the Alabama court holding a hearing on the plaintiffs' allegations of fraud. The plaintiffs here have made no allegation that the Alabama judge participated in the fraud, and so we have considerable trouble understanding why they should not receive fair treatment in that court.

Our conclusion that, under the *Rooker-Feldman* doctrine, we lack subject matter jurisdiction over this case does not leave the plaintiffs without a remedy.[4] The Alabama court has already scheduled a hearing for December 18, 1995, to allow the plaintiffs to present evidence that the defendants in this case perpetrated a fraud upon that court in connection with the award of attorneys' fees. One of two things will likely happen there. The Alabama court may make it clear to these plaintiffs that it was aware that the plaintiff class would suffer an out-of-pocket loss as a result of the attorneys' fees awarded, but that the court considered that result reasonable in light of the benefits to the class or for other reasons; in that instance, the plaintiffs simply have no claims, regardless of how aggrieved they may feel. On the other hand, the court may make it clear to these defendants that it was not aware of this fact; in that instance, the court will, most likely, inquire further into their conduct. And, in the event that the matter is not resolved in this fashion, counsel for the plaintiffs in this case represented to this Court at the oral argument on the plaintiffs' emergency motion that Alabama law allows an independent suit alleging fraud upon the court in an earlier

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[4] Even if it did, of course, our conclusion here would have to be the same.

action to be brought within three years of the entry of the fraudulently procured judgment. The final judgment in the *Hoffman* litigation was entered on January 24, 1994, and so, presumably, these plaintiffs here could bring such an action.

CONCLUSION

For the forgoing [sic] reasons, we grant the motion to dismiss of defendants Edelman & Combs and Daniel A. Edelman, joined by all defendants except John or Jane Does 1 through 50, and we dismiss this case for lack of subject matter jurisdiction. All other pending motions, including the plaintiffs' emergency motion for a temporary restraining order and the motion of Bank of Boston and BancBoston Mortgage Corporation to dismiss for improper venue, are denied as moot. This order is final and appealable.

ENTER:

/s/ Paul E. Plunkett
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96-1019

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ, and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, T. THOMAS COTTINGHAM, EZELL & SHARBROUGH, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,

Defendants-Appellees.

On Petition For Rehearing With
Suggestion For Rehearing En Banc

November 22, 1996

ORDER

A panel decided this case on August 8, 1996. On August 22, 1996, the plaintiffs-appellants filed a petition for rehearing and suggestion for rehearing en banc. Subsequently, the judges on the panel voted to deny the petition for rehearing, and a vote was requested on the suggestion for rehearing en banc. A majority of the active members of the court have voted to deny rehearing en banc. Chief Judge POSNER and Circuit Judges EASTERBROOK, MANION, ROVNER, and DIANE P. WOOD voted to grant rehearing en banc.

IT IS THEREFORE ORDERED that the petition for rehearing is hereby DENIED. Because a majority of judges voted to deny rehearing en banc, the suggestion to do so is also DENIED.

EASTERBROOK, Circuit Judge, with whom POSNER, Chief Judge, and MANION, ROVNER, and DIANE P. WOOD, Circuit Judges, join, dissenting from the denial of rehearing en banc.

A class action contending that the Bank of Boston and its affiliates (collectively, the Bank) did not promptly post interest to real estate escrow accounts was filed in Alabama by a Chicago law firm. *Hoffman v. BancBoston Mortgage Corp.*, No. CV-91-1880 (Mobile Cty. Cir. Ct.). Settlement ensued, and the class members learned only what the notice told them. Few opted out or objected, because the maximum award to any class member was less than $9. Any recovery, however

small, seemed preferable to initiating a separate suit or even bearing the costs of protesting the settlement's terms. After the state judge approved the pact, the Bank carried out its part: it disbursed more than $8 million to the class attorneys in legal fees and credited most accounts with paltry sums. Problem: the fees, equal to 5.32 percent of the balance in each account, were debited to the accounts. For many accounts the debit exceeded the credit. Dexter J. Kamilewicz, for example, received a credit of $2.19 and a debit of $91.33, for a loss of $89.14.

Outraged account holders hired new lawyers to sue their "champions" from the state case for malpractice, breach of fiduciary duty, indeed for fraud. Defendants insist that most members of the class emerged with net benefits, but they do not deny that many suffered net losses—and that these impending losses, known to those who negotiated the settlement, were not disclosed to the class members. Kamilewicz believes that even when the credit exceeded the debit the account holder lost, because the credit would have been made when the mortgage terminated and the escrowed sum was released; the real economic benefit was not the amount of the credit but the interest that could be earned from investing the payment sooner.

Kamilewicz and the other representative plaintiffs sued not only the lawyers for the plaintiff class in *Hoffman* but also the Bank and the Bank's lawyers. Everything the Bank did to affect Kamilewicz's interests was authorized by the judgment

based on the settlement, so the Bank's inclusion in the case marked an effort to obtain collateral review of the state court's judgment. Kamilewicz argued that the judgment is void with respect to account holders who live outside Alabama—for what right does Alabama have to instruct financial institutions in Florida to debit the accounts of citizens of Maine and other states? (Despite its name, BancBoston's headquarters are in Florida, and the Kamilewiczes hail from Maine.) Class members are not bound when a state court exceeds its jurisdiction. The Attorneys General of Florida, Maine, and seven other states have filed a brief as amicus curiae to protest their citizens' treatment by Alabama. According to Kamilewicz, the Alabama judgment is doubly flawed, because the notice was so misleading that it denied the class members due process of law. A deficient notice means that the class members' right to opt out was defeated, which has jurisdictional consequences of its own. Lack of jurisdiction and unconstitutional procedures are recognized grounds for disregarding a judgment in a class action. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Richards v. Jefferson County*, ____ U.S. ____, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). But by asking for collateral review of a judgment, the Kamilewicz class invited the response: "In federal court?" Under the *Rooker-Feldman* doctrine, named after *Rooker v. Fidelity Trust Co.* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), the Supreme Court of the United States is the only federal court authorized to review a

state court's judgment in civil litigation. Defendants invoked this rule and argued that the Kamilewicz class could obtain relief only from a state court. The district court agreed and dismissed the entire complaint for want of jurisdiction, and a panel of this court affirmed. 92 F.3d 506 (1996).

Suppose A sues B in a state that lacks any connection to B or to the dispute. B refuses to appear and the court enters a default judgment, which A attempts to collect using the processes of the federal court under the diversity jurisdiction. Would the court really direct B to pay, without inquiring into the jurisdiction of the state court? Certainly not in the fifth circuit, which has held that the *Rooker-Feldman* doctrine permits the kinds of collateral attacks that any state court of general jurisdiction could entertain. *Davis v. Bayless,* 70 F.3d 367, 375-76 (5th Cir. 1995). ("Any" is an important qualifier, for reasons discussed in *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995), and *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700 (7th Cir. 1987).) When *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), held that a judgment rendered without personal jurisdiction over members of the class is not entitled to full faith and credit, the Justices did not add: "except in federal court." Granted, the defendants in today's case are not trying to execute a judgment; they want to fend off a challenge to the status quo. But the difference between offensive and defensive use of a judgment is not important to the panel's conclusion, or to mine—which is that a judgment that is not entitled to full faith

and credit does not acquire extra force via the *Rooker-Feldman* doctrine.

Collateral attacks based on lack of personal or subject-matter jurisdiction are proper, no less in class actions than in other cases—indeed, they are especially appropriate where class members are stunned to find that, although aligned as plaintiffs, they are net losers, just as if the original defendants had filed and prevailed on a counterclaim of which they received no notice and over which the state court had no jurisdiction. In effect, though not in name, this was a defendant class, attempting (unbeknownst to its members) to fend off predatory lawyers' claims to the balances in the escrow accounts. The substantial jurisdictional problems entailed by defendant classes, *see Phillips Petroleum,* 472 U.S. at 808, 811 & n. 3, 105 S.Ct. at 2972-73, 2974 & n. 3; Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions,* 62 Ind. L.J. 597, 607-12 (1987), were aggravated by the class members' ignorance of their exposure.

In *Matsushita Electric Industrial Co. v. Epstein,* ____ U.S. ____, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996), members of a class in a securities case filed in state court initiated an independent action in federal court for the purpose of attacking the terms on which the state case had been settled. They argued that the state court lacked jurisdiction to resolve claims based on federal securities law. Ultimately they lost - but not on *Rooker-Feldman* grounds. The Supreme Court concluded that state judges may accept and enforce

settlements of federal claims. This it held on the merits. It did not mention the possibility that the federal court lacked jurisdiction, which I think signifies how obvious it was to all concerned that the *Rooker-Feldman* doctrine is inapplicable. If it was inapplicable in *Matsushita*, it is inapplicable here too. I grant that *Matsushita* did not "hold" this, because it did not discuss jurisdiction. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 & n. 29, 104 S.Ct. 900, 918 & n. 29, 79 L.Ed.2d 67 (1984); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 & n. 9, 73 S.Ct. 67, 69 & n. 9, 97 L.Ed. 54 (1952). Shared assumptions are revealing nonetheless. And in today's case as in *Matsushita* the aggrieved class members may choose a new forum; they need not return to a court whose lack of jurisdiction is the basis of their position. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760, 767-69 (3d Cir. 1989). None of this is to say that the Alabama court actually lacked jurisdiction, or that the notice was inadequate; to get anywhere against the Bank the Kamilewicz class must establish these things; but under the panel's approach the state court's judgment blocks federal litigation even if it lacked jurisdiction.

Next consider plaintiffs' claim against the *Hoffman* class counsel, which is not a collateral attack on a judgment. It takes the judgment as a given—indeed, it is only so long as the judgment stands that the litigant has a compensable loss. Neither state nor federal law requires a malpractice suit to be filed in the same court that handled the initial litigation. The

Rooker-Feldman doctrine therefore does not apply to malpractice suits, which may be litigated in federal courts without regard to the location of the initial case. If the panel is right, no malpractice suit growing out of state litigation in which the judge awarded attorneys' fees—maybe no malpractice suit, period—may be brought in federal court, even if all requirements of the diversity jurisdiction have been satisfied. This holding is sufficiently troubling and affects so many other cases that it is worth the time of our court to consider the subject en banc.

The *Rooker-Feldman* doctrine has two rationales: first, that the decision of a state court reached after notice and opportunity for hearing is not an independent violation of the Constitution, and therefore is not actionable under 42 U.S.C. § 1983; second, that by virtue of 28 U.S.C. § 1257 only the Supreme Court may review the decision of a state court in civil litigation. See *ASARCO Inc. v. Kadish,* 490 U.S. 605, 622-23, 109 S.Ct. 2037, 2048-49, 104 L.Ed.2d 696 (1989); *GASH Associates v. Rosemont*, 995 F.2d 726 (7th Cir. 1993). The rationales of the doctrine identify important limits: the first theme is irrelevant to a malpractice suit, and the second is beside the point, because the plaintiff does not seek review of the decision. The original parties' entitlements *vis-a-vis* each other are fixed by the judgment. The contest now is between the litigant and his lawyer. We have emphasized this distinction many times - not only in malpractice cases, but also when the loser tries to get relief from judgment because of the

lawyer's incompetence. E.g., *United States v. 7108 West Grand Avenue*, 15 F.3d 632 (7th Cir. 1994).

Consider a related sequence of litigation. A sells a painting to B, and before delivering the painting to B sells it again to C. Then A learns that the painting has increased in value and holds onto it. B sues A in state court for specific performance and prevails. Next C sues A for damages. Surely the *Rooker-Feldman* doctrine does not foreclose C from using federal court. C's suit does not attack the judgment (B keeps the painting); C wasn't even a party to B v. A; and the cause of C's loss wasn't the judgment, but A's double dealing. So too with malpractice litigation: it is a suit against a nonparty (the lawyer) alleging harm from incompetent or deceitful acts. That the lawyer's misconduct occurred in a judicial proceeding doesn't insulate the lawyer from liability, even when the *Rooker-Feldman* doctrine insulates the *judgment*.

The Supreme Court's most recent discussion of the *Rooker-Feldman* doctrine strongly implies that it does not bar malpractice litigation. *Johnson v. DeGrandy*, 512 U.S. 997, ____, 114 S.Ct. 2647, 2654, 129 L.Ed. 2d 775 (1994), holds that the *Rooker-Feldman* doctrine does not bar voting rights litigation filed by the United States, even though the districts being challenged were approved by a state court in adversarial litigation. The Court observed that the United States was not a party to the state case and therefore could not have presented its claim by petition for certiorari under § 1257; the inability

to do so meant that it could litigate independently. We, too, have held that the *Rooker-Feldman* doctrine does not affect suits by or against persons who were not parties to the initial case. *Leaf v. Supreme Court of Wisconsin,* 979 F.2d 589, 598 (7th Cir.1992); *Downs v. Westphal*, 87 F.3d 202, 203 (7th Cir.1996) (Rovner, J., concurring). Cf. *Lynk v. LaPorte Superior Court No. 2,* 789 F.2d 554 (7th Cir.1986). It may apply when the non-parties occupy positions functionally identical to the parties (for example, when a person whose property has been condemned by a city retaliates with a suit against the mayor), but the class attorneys are not the Bank's alter egos. The attorneys representing the Hoffman class were not parties to the Alabama case. Neither were the class members. Absent class members are represented by the named plaintiffs and their lawyers, but they aren't parties, a point reflected in federal litigation by disregarding their citizenship. They are ignored in negotiating settlements as well. A real party's lack of assent means that there is no settlement; but the missing class members don't sign the settlement, and their objection is not dispositive. It is crammed down the throats of objectors, which cannot be done to real parties. What is more, the members of the Kamilewicz class could not have presented their malpractice arguments to the Supreme Court by petition for certiorari under § 1257: they did not discover the malpractice until later (it was not reflected in the record of the state proceeding); it was not litigated in the Hoffman case; class members can't seek appellate review without intervening, *In re VMS Limited Partnership*, 976 F.2d 362 (7th Cir.1992); *Research Corp. v.*

Asgrow Seed Co., 425 F.2d 1059 (7th Cir.1970), which further illustrates their non-party status; and of course malpractice is not a federal claim, so it is outside the scope of § 1257. For some purposes missing class members are treated *like* parties, but only if the named plaintiffs adequately represent the interests of the class, and only if the unnamed members of the class receive adequate notice and elect not to opt out, *Phillips Petroleum*, 472 U.S. at 808-13, 105 S.Ct. at 2972-75—which in this case is the very thing in dispute! It gets the cart before the horse to reject, as barred by a judgment, an effort by the absent class members to show that they were not properly brought into the state case and therefore are not affected by the judgment.

From all of this it follows that a malpractice action is not affected by the *Rooker-Feldman* doctrine. Does the fairness hearing required to approve the settlement of a class action make a difference? I think not. For the reasons just explained, absent class members (*especially* those who deny the state court's jurisdiction over them) are not parties and cannot be treated as bound by the findings implicit in the approval of the settlement and the award of fees to attorneys. The panel implied approval of the district court's conclusion that the class members were effectively defendants resisting financial demands by the attorneys, 92 F.3d at 511, which makes the jurisdictional shortcoming clear and establishes that the judgment is not entitled to full faith and credit.

All jurisdictional doubts to one side, a settlement followed by a fairness hearing remains more like a contract than like litigation. Accordingly there is even less reason to apply the *Rooker-Feldman* doctrine than in a normal malpractice case, where the loss ensues from a genuine contest. Representative plaintiffs and their lawyers may be imperfect agents of the other class members—may even put one over on the court, in a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information. This possibility, a staple of the literature about class actions, e.g., John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L.Rev. 1343 (1995); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L.Rev. 1 (1991) enjoys judicial recognition. See *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 630-31 (3d Cir.1996), cert. granted under the name *Amchem Products, Inc. v. Windsor*, ____ U.S. ____, 117 S.Ct. 379, ____ L.Ed.2d____ (1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.1995). Recall that even the active opposition of class members does not automatically block the settlement, which therefore rests on the *lawyers*' consent, not the litigants' agreement or the legal decision of a court.

The Kamilewicz class asserts that it suffered harm from the *Hoffman* class lawyers' breach of their duties of care and loyalty in negotiating the settlement, which was concealed from the Alabama judge (and the class) by a further breach of the duty of loyalty in drafting the notice about the settlement. The notice not only didn't alert the absent class members to the impending loss but also pulled the wool over the state judge's eyes. Suing faithless agents is far from the core of the *Rooker-Feldman* doctrine, which should not be extended to block suits like this. "Were [plaintiff] merely claiming that the decision of the state court was incorrect, even that it denied him some constitutional right, the doctrine would indeed bar his claim. But if he claims, as he does, that people involved in the decision violated some independent right of his . . . then he can, without being blocked by the *Rooker-Feldman* doctrine, sue to vindicate that right." *Nesses v. Shepard*, 68 F.3d 1003, 1004 (7th Cir.1995).

The panel's decision is important. If I am right that the state court's award of attorneys' fees does not matter, then the decision logically bars all malpractice and related fiduciary-duty suits arising out of state litigation. We have entertained many, without seeing jurisdictional problems. And even if I am wrong about the sweep of the panel's decision, the issue is recurrent. Two recent decisions of other circuits—*Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir.1996), and *Diaz v. Sheppard*, 85 F.3d 1502 (11th Cir.1996)—hold that a class may prosecute a malpractice action against its attorneys even after a settlement has been approved in a fairness hearing.

Although the initial suits in both *Durkin* and *Diaz* were in federal court, making the *Rooker-Feldman* doctrine inapplicable on our panel's holding, the approach of *Durkin* and *Diaz* is incompatible with the panel's. If the *Rooker-Feldman* doctrine applies to suits by the absent class members because a malpractice action is a collateral attack on the order approving the settlement and awarding attorneys' fees, then the law of preclusion (res judicata) should bar malpractice actions in any court, state or federal, and without regard to which judicial system handled the first case. Yet no one thinks that. A malpractice suit is an independent action. A (potential) defense of issue preclusion is defeated by the very theory of the claim: that the first judgment is unreliable because of the attorney's bungling. The bungler cannot point to the adverse judgment produced by his own incompetence to ward off the client's demand. The Kamilewicz class may fail in its proof, or it may encounter other obstacles, but the *Rooker-Feldman* doctrine does not close the door of the federal courthouse.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ and MARTHA E. PRESTON, on behalf of themselves and all others similarly situated,	
Plaintiffs,	Civil Action No. 95C 6341
v.	Class Action
BANK OF BOSTON CORPORATION, BANCBOSTON MORTGAGE CORPORATION, BURR & FORMAN, THOMAS COTTINGHAM, EZELL & SHARBROUGH, MARK EZELL, JOHN W. SHARBROUGH III, EDELMAN & COMBS, DANIEL A. EDELMAN, LAWRENCE WALNER & ASSOCIATES, LAWRENCE WALNER, and John or Jane Does 1 through 50,	COMPLAINT JURY TRIAL DEMANDED (Filed November 2, 1995)
Defendants.	

Based upon personal knowledge as to themselves and their own acts, and upon information and belief as to all other matters, plaintiffs allege as follows:

JURISDICTION AND VENUE

1. This action arises and is brought under Sections 1962(c) and 1962(d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"); 18 U.S.C. §§ 1962(c) and 1962(d); Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983; and under the common law.

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331 and 1343 and 18 U.S.C. § 1964. The state law claims form part of the same case or controversy under Article III of the United States Constitution as the claims that arise under federal law. Therefore, this Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a).

3. This Court also has jurisdiction over the subject matter of this action under 28 U.S.C. § 1332 because this is a civil action in which the matter in controversy, excluding interest, exceeds $50,000 and complete diversity exists among the parties to this action.

4. The acts and occurrences giving rise to the claims alleged in this action took place, in part, within the Northern District of Illinois. Venue is proper in this district under Section 1965 of RICO, 18 U.S.C. § 1965, and 28 U.S.C. § 1391(b) because each of the defendants resides, has agents, transacts or has transacted his or its affairs within the district, and the defendants, through their illegal activity, have had substantial contacts within the district. Further, based on the

allegations set forth in this Complaint, the ends of justice require that this action be heard before the District Court for the Northern District of Illinois.

SUMMARY OF ALLEGATIONS

5. Plaintiffs' claims in this litigation are that Bank of Boston Corporation ("Bank of Boston"), BancBoston Mortgage Corporation ("BancBoston"), the banks' lawyers in a nationwide class action, and the lawyers representing the plaintiff class in the nationwide class action agreed and conspired to mislead and deceive the class members so that the class members' lawyers would recover enormously excessive fees. The result was that the plaintiffs, homeowners whose mortgages were being serviced by BancBoston, paid massive attorneys' fees -- fees that far exceeded both the benefit of the litigation to the class members and the lawyers' representations of what the class members would pay.

6. Plaintiffs in *Hoffman, et al. v. BancBoston Mortgage Corp., et al.*, Civil Action No. CV-91-1880 (Circuit Ct., Mobile Cty., Ala. 1991) (Braxton L. Kittrell, Jr., J.) (the "*Hoffman* Action"), were a nationwide class of approximately 715,000 individuals who previously or currently had mortgages with BancBoston. The class action challenged BancBoston's practice -- a practice that became prohibited by United States Department of Housing and Urban Development regulations soon after the settlement of the case -- under which BancBoston overcharged mortgage holders whose mortgages

it serviced in order to create a small "cushion" or "surplus" in each mortgage holder's escrow account.

7. The surplus money always belonged to the mortgage holder and indisputably would have been returned to the mortgage holder at the termination of the mortgage -- the only issue in the *Hoffman* Action was the propriety of BancBoston holding that surplus until the time that it would be returned to the mortgage holder. Although the average surplus was minimal, the sum of all the escrow surplus totaled in excess of $41 million at the time the *Hoffman* Action was settled.

8. The Hoffman Action was settled by an agreement that BancBoston would stop overcharging to create excessive escrow surpluses; would pay a small amount of interest (ranging from $0.00 to $8.76) to each class member based on past overcharges; and would refund any excess surplus in each escrow account to the mortgage holder. In turn, the attorneys would receive as fees twenty-eight percent of BancBoston's entire excess surplus, deducted from each account as a "miscellaneous disbursement." The result of the *Hoffman* Action was that most, if not all, class members *lost* money and their attorneys received fees in excess of $14 million.

9. The fraudulent scheme, in which the class members' attorneys, the banks and the banks' attorneys knowingly acquiesced and participated, involved

characterizing the entire excess escrow surplus as the "economic benefit" to the class -- it was not. All of the parties knew that without a lawsuit, all of the excess escrow surplus would have been returned to the individual class members at the end of their mortgages -- because it was indisputably theirs.

10. Defendants' conduct in the *Hoffman* Action constitutes a violation of RICO, 18 U.S.C. §§ 1962(c), 1962(d), and 1964(c), because defendants devised, conspired to devise, and intended to devise a scheme and artifice to defraud plaintiffs through a pattern of racketeering activity in order to obtain money from plaintiffs by means of false and fraudulent pretenses, representations, and promises and committed numerous predicate acts of mail and wire fraud in order to implement their scheme and artifice to defraud plaintiffs.

11. Defendants' conduct in the *Hoffman* Action constitutes a violation of Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, because defendants, acting under color of state law, deprived plaintiffs of their property without due process of law and deprived plaintiffs of rights, privileges, or immunities secured by the United States Constitution and the laws of the United States.

12. Defendants' conduct in the *Hoffman* Action also gives rise to numerous common law claims, including fraud,

fraudulent concealment, negligent misrepresentation, attorney malpractice, breach of fiduciary duty, and conversion.

13. Plaintiffs in this action, all of whom were members of the plaintiff class in the *Hoffman* Action, seek to recover their actual damages, totaling several million dollars, resulting from defendants' conduct in the *Hoffman* Action and, in addition, seek an award of treble damages, exemplary damages, attorneys' fees, and costs.

THE PARTIES

14. Plaintiffs Dexter J. Kamilewicz and Gretchen L. Kamilewicz reside in a home located at Sea Meadows Lane, Yarmouth, Maine 04096. The home is owned by Gretchen Kamilewicz and is secured by a mortgage loan for which Dexter Kamilewicz and Gretchen Kamilewicz are the mortgagors/borrowers.

15. When Mr. and Mrs. Kamilewicz refinanced their home on October 23, 1992, they did so with a mortgage loan from defendant BancBoston.

16. Plaintiff Martha E. Preston currently resides at E11583A Mine Road, Baraboo, Wisconsin 53913.

17. On November 20, 1989, Ms. Preston purchased a home located at Sugarloaf Street Extension, South Deerfield, Massachusetts 01373. She financed the purchase of her home with a mortgage loan from NewBoston Mortgage Corporation. On December 5, 1989, Ms. Preston's mortgage

was transferred to BancBoston for servicing and was serviced by BancBoston until Ms. Preston sold the property on October 16, 1995.

18. Defendant Bank of Boston Corporation is a registered bank holding company incorporated in Massachusetts with its principal place of business in Massachusetts. Through a network of national and state banking subsidiaries, Bank of Boston conducts business throughout the United States, including within the state of Illinois.

19. Defendant BancBoston Mortgage Corporation is a Florida corporation engaged in the business of first mortgage loan servicing. BancBoston conducts its business not only from its principal place of business located at 7301 Baymeadows Way, Jacksonville, Florida 32256, but also from various branch locations throughout the United States, including a branch office located in Schaumburg, Cook County, Illinois.

20. Defendant Burr & Forman is a partnership that is organized and that exists under the laws of the state of Alabama and that has its principal place of business in Birmingham, Alabama.

21. From June 1991 through at least March 1995, Burr & Forman served as legal counsel to defendants Bank of Boston and BancBoston in connection with Bank of Boston

and BancBoston's defense and settlement of the *Hoffman* Action.

22. Defendant T. Thomas Cottingham is an attorney licensed to practice law within the state of Alabama. At all times from May 28, 1991 until the present, defendant Cottingham has been a member of the law firm of Burr & Forman, a partnership with its principal place of business in Birmingham, Alabama.

23. Defendants John or Jane Does 1 through 25 are members of or employed by defendant Burr & Forman and participated in the scheme set forth in paragraphs 88 through 107.

24. Defendants Bank of Boston Corporation, BancBoston Mortgage Corporation, Burr & Forman, Cottingham, and John or Jane Does 1-25 hereafter will be referred to collectively as the "bank defendants."

25. Defendant Ezell & Sharbrough is a partnership that is organized and exists under the laws of the state of Alabama and that has its principal place of business in Mobile, Alabama.

26. From June 1991 through at least March 1995, Ezell & Sharbrough purported to serve as legal counsel to the plaintiffs, named and unnamed, in the *Hoffman* Action.

27. Defendant Mark Ezell is an attorney licensed to practice law within the state of Alabama. At all times from May 28, 1991 until the present, defendant Ezell has been a member of the law firm of Ezell & Sharbrough, a partnership with its principal place of business in Mobile, Alabama.

28. Defendant John W. Sharbrough, III is an attorney licensed to practice law within the state of Alabama. At all times from May 28, 1991 until the present, defendant Sharbrough has been a member of the law firm of Ezell & Sharbrough, a partnership with its principal place of business in Mobile, Alabama.

29. Defendant Edelman & Combs is a partnership that is organized and exists under the laws of the state of Illinois and that has its principal place of business in Chicago, Illinois.

30. From June 1991 through at least March 1995, Edelman & Combs purported to serve as legal counsel to the plaintiffs, named and unnamed, in the *Hoffman* Action.

31. Defendant Daniel A. Edelman is an attorney licensed to practice law within the state of Illinois. At all times from May 28, 1991 until the present, defendant Edelman has been a member of the law firm of Edelman & Combs, a partnership with its principal place of business in Chicago, Illinois.

32. Defendant Lawrence Walner & Associates is a sole proprietorship that is organized and that exists under the laws of the state of Illinois and that has its principal place of business in Chicago, Illinois.

33. From June 1991 through at least March 1995, Lawrence Walner & Associates purported to serve as legal counsel to the plaintiffs, named and unnamed, in the *Hoffman* Action.

34. Defendant Lawrence Walner is an attorney licensed to practice law within the state of Illinois. At all times from May 28, 1991 until the present, defendant Walner has been the principal of Lawrence Walner & Associates, a law firm with its principal place of business in Chicago, Illinois.

35. Defendants John or Jane Does 26 through 50 are members of or employed by defendants Ezell & Sharbrough, Edelman & Combs, Lawrence Walner & Associates or Burr & Forman and participated in the scheme set forth in paragraphs 88 through 107.

36. Defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26 through 50 hereafter will be referred to collectively as the "counsel defendants."

CLASS ACTION ALLEGATIONS

37. Plaintiffs in this action were members of the plaintiff class in the *Hoffman* Action. They seek to have this suit declared a class action under Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure for themselves and on behalf of all other persons who were members of the subclass certified as Subclass Number One in the *Hoffman* Action, as that subclass is defined in paragraph 49(a) of this Complaint. Excluded from the Class are defendants herein; members of the immediate family of each of the individual defendants; any person, firm, trust, corporation, officer, director or other individual or entity in which any defendant has a controlling interest, or that is related to or affiliated with any of the defendants; Carl F. Hoffman and Deborah L. Hoffman, the named plaintiffs in the *Hoffman* Action; and the legal representatives, heirs, successors-in-interest or assigns of any such excluded person.

38. The members of the Class are so numerous that joinder of each member in this action is impracticable. While the exact number of Class Members is unknown to plaintiffs at this time, they are believed to number in the hundreds of thousands.

39. Plaintiffs fairly and adequately will represent and protect the interests of the members of the Class. They are committed to litigating this matter vigorously. Plaintiffs are greatly disturbed at being victims of the deceptive, misleading, and fraudulent practices of the attorneys claiming

to have acted on their behalf in the *Hoffman* Action, the attorneys representing Bank of Boston and BancBoston in the *Hoffman* Action, and Bank of Boston and BancBoston themselves. Plaintiffs wish to see that the wrongs that have been committed are remedied. To ensure that the claims of the Class are litigated vigorously, plaintiffs have retained competent and experienced counsel to prosecute this action.

40. Plaintiffs' claims are typical of the claims of the other members of the Class because plaintiffs and all the Class Members' damages arise from and were caused by the same deceptive, misleading, and false representations and omissions made by or chargeable to defendants. Plaintiffs do not have any interests antagonistic to, or in conflict with, the Class they seek to represent.

41. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because of the number of Class Members, the expense and burden of individual litigation would make it virtually impossible for each Class Member to seek redress for the wrongful conduct alleged. Plaintiffs know of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

42. The prosecution of separate actions by individual Class Members would create a risk of inconsistent and varying results that could establish incompatible standards of conduct for the various defendants.

43. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are the following:

(a) Whether the Notice of Hearing of Proposed Settlement of Class Action prepared by defendants and mailed to plaintiffs on December 9 and 10, 1993, and the Notice of Hearing on Proposed Settlement of Class Action prepared by defendants and caused by defendants to be published in *USA Today* on December 13 and 20, 1993, contained deceptive, materially misleading, and false representations and statements of facts, or omitted to state material facts, concerning the settlement proposed by defendants;

(b) Whether defendants violated Section 1962 of RICO, 18 U.S.C. § 1962;

(c) Whether defendants conspired to violate Section 1962 of RICO, 18 U.S.C. § 1962(d);

(d) Whether defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 violated plaintiffs' civil rights pursuant to 42 U.S.C. § 1983;

(e) Whether defendants defrauded plaintiffs;

(f) Whether defendants fraudulently concealed material facts from plaintiffs;

(g) Whether defendants negligently misrepresented material facts;

(h) Whether defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 committed attorney malpractice in connection with their purported representation of plaintiffs in the *Hoffman* Action;

(I) Whether defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 breached their fiduciary duty to plaintiffs in connection with their purported representation of plaintiffs in the *Hoffman* Action;

(j) Whether defendants Bank of Boston and BancBoston are liable for conversion as a result of their orchestrating and acceding to the disbursement of funds from plaintiffs' individual escrow accounts for the purpose of paying attorneys' fees in the *Hoffman* Action;

(k) Whether defendants Bank of Boston and BancBoston breached their fiduciary duty to plaintiffs by

orchestrating and acceding to the disbursement of funds from plaintiffs' individual escrow accounts for the purpose of paying attorneys' fees in the *Hoffman* Action and in denominating that disbursement a "miscellaneous disbursement" on each plaintiff's annual escrow statement;

(l) Whether defendants acted willfully, recklessly or with gross negligence in omitting and/or misrepresenting material facts and otherwise through their participation in the conduct alleged in this Complaint; and

(m) The appropriate measure and extent of damages sustained by plaintiffs.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

The Hoffman Action -- The Members of the Class

44. On or about May 28, 1991, Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 commenced the *Hoffman* Action in the Circuit Court of Mobile County, Alabama on behalf of Carl F. Hoffman, Deborah L. Hoffman, and others situated similarly.

45. The class of individuals that the counsel defendants purported to represent included all persons who: (a) at any time during the ten years before the filing of the *Hoffman* Action (b) were obligated under, or owned property secured by, a residential real estate mortgage providing for an

escrow account for taxes and insurance, (c) had an escrow account, and (d) had their escrow deposits computed by BancBoston or any other part of the Bank of Boston organization in the same manner as the escrow deposits of Mr. and Mrs. Hoffman were calculated. Hoffman Complaint, ¶ 12.

46. On July 2, 1992, the Alabama Court entered an Order conditionally certifying the *Hoffman* Action as a class action pursuant to Rule 23(b)(2), Alabama Rules of Civil Procedure. The Court's Order certifying the class was essential to the *Hoffman* Action proceeding as a class action. Among other findings, the court found that "[t]he attorneys representing the Hoffmans and the class are qualified, experienced and able to conduct class action litigation." Certification of Class Order, at p. 2.

47. On November 22, 1993, defendants filed a Joint Motion and Stipulation in which they requested, among other things, that the Court enter an Order conditionally approving of a settlement class consisting of "all persons whose loan was secured by a residential real estate mortgage and for whom defendants, or their predecessors ("BancBoston"), acted as servicer at any time from May 28, 1981 to the present." Joint Motion and Stipulation, ¶ 1.

48. On December 6, 1993, the Alabama Court entered an Order conditionally approving the settlement class as defined in paragraph 47 of this Complaint.

49. In its December 6, 1993 Order, the Court also approved a Notice of Hearing on Proposed Settlement of Class Action submitted by defendants, which, among other things, divided the *Hoffman* class into two subclasses defined as follows:

(a) Subclass Number One (consisting of active loans) comprised all persons whose residential real estate mortgage loans BancBoston or its predecessors serviced or subserviced and for which escrow accounts were maintained for at least six months, and were still servicing or subservicing on November 9, 1993; and

(b) Subclass Number Two (consisting of former loans) comprised all persons whose residential real estate mortgage loans BancBoston or its predecessors serviced or subserviced for a minimum of six months at any time after May 28, 1981 for which escrow accounts were maintained and that were paid off, transferred, waived or otherwise removed from BancBoston's books as of November 9, 1993.

50. As of December 6, 1993, plaintiffs Dexter Kamilewicz, Gretchen Kamilewicz, and Martha Preston were members of Subclass Number One of the *Hoffman* class because they were persons whose loans were secured by a residential real estate mortgage for whom defendant BancBoston had been acting as servicer since October 23, 1992 and December 5, 1989, respectively, and for whom defendant BancBoston continued to act as servicer.

The Hoffman Action -- The Nature of the Allegations

51. In the complaint filed on behalf of the *Hoffman* class, the counsel defendants alleged that "[e]ach of the mortgages involved provided for the monthly deposit of 1/12 of annual escrow requirements and a surplus of between zero and two months' escrow payments." Hoffman Complaint, ¶ 18.

52. The counsel defendants further alleged that "[t]he actual practice of BancBoston Mortgage with respect to the amounts which it requires its mortgagors to deposit in escrow each month does not conform to the language in its mortgages. Instead, BancBoston Mortgage required deposits that would create and maintain substantial surpluses." Hoffman Complaint, ¶ 20.

53. Moreover, the counsel defendants alleged that "[a]s a result of BancBoston Mortgage's practice, Mr. and Mrs. Hoffman and each of the other class members have been assessed excessive escrow deposit requirements. Their monthly payments have been larger than they should have been." Hoffman Complaint, ¶ 32.

54. According to the counsel defendants, "[a]ll benefits from the excess funds deposited have been retained by BancBoston Mortgage, as provided by the mortgage instruments, and the Bank of Boston Group. As a result,

BancBoston Mortgage and Bank of Boston have been unjustly enriched." Hoffman Complaint, ¶ 33.

55. In addition, the counsel defendants alleged in the Hoffman complaint that "[t]he imposition of excessive escrow deposit requirements constituted a breach of the contractual agreement set forth in the mortgages signed by Mr. and Mrs. Hoffman and each class member" and that as a result of the alleged breach, "Mr. and Mrs. Hoffman and each class member suffered actual damages, in that they were deprived of money and/or in that their real estate was encumbered by unlawfully inflated deposit requirements." Hoffman Complaint, ¶¶ 36, 38.

56. After the *Hoffman* Action was conditionally certified by the Alabama Court as a class action on July 2, 1992, the counsel defendants filed two amended complaints.

57. First, the counsel defendants filed an amended complaint adding claims under the Massachusetts Unfair and Deceptive Acts and Practices statutes or, alternatively, similar statutes in force in other states.

58. Then, on July 13, 1993, the counsel defendants filed a Second Amended Complaint adding claims for fraud and breach of duty.

The Hoffman Action -- Bank of Boston and BancBoston's Defense

59. In the Answer filed by Bank of Boston and BancBoston, by and through their attorneys, Bank of Boston and BancBoston denied that they had breached their mortgage escrow agreements with Mr. and Mrs. Hoffman and with the other members of the *Hoffman* class.

60. In addition, Bank of Boston and BancBoston raised various affirmative defenses, including, but not limited to, the following:

(a) That BancBoston complied with the provision within the Hoffmans' mortgage note permitting the lender "to 'reasonably' estimate an escrow amount for the borrower to pay monthly and to make 'reasonable estimates' of the taxes, insurance and other assessments that must be paid in the future," Answer, ¶ 3 at p. 7;

(b) That BancBoston complied with a provision in many of the mortgages at issue that stated that it was entitled to collect and hold funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for borrowers' escrow accounts under the federal Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* ("RESPA"), Answer, ¶ 4 at p.7;

(c) That the United States Department of Housing and Urban Development ("H.U.D.") expressly had approved BancBoston's method of accounting and analysis of escrow accounts, Answer, ¶ 6 at p. 8;

(d) That BancBoston's method of escrow accounting and analysis was consistent with Section 10 of RESPA, 12 U.S.C. § 2609, Answer, ¶ 7 at p. 8; and

(e) That BancBoston's method of escrow accounting and analysis complied with the laws and regulations of the United States Congress, H.U.D., the Veterans Administration, the Federal Housing Administration, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and other United States agencies and quasi-governmental agencies. Answer, ¶ 8 at p. 8.

61. On October 1, 1993, the bank defendants prepared and filed an Answer to Plaintiffs' Second Amended Complaint in which Bank of Boston and BancBoston again denied any liability to plaintiffs and again asserted numerous defenses, including those set forth in paragraph 60 above.

The Hoffman Action -- Partial Summary Judgment

62. On July 16, 1993, the counsel defendants filed a motion for partial summary judgment on plaintiffs' breach of contract claim.

63. On October 12, 1993, after hearing oral argument on plaintiffs' motion, the Alabama Court granted plaintiffs' motion and entered an Order declaring, among other things, that the escrow account deposit requirements imposed on the Hoffmans by BancBoston exceeded those permitted under the mortgage contract and thus constituted a breach of the mortgage contract.

64. The Alabama Court's October 12, 1993 Order also declared that BancBoston had breached its mortgage contracts with the other members of the *Hoffman* class upon whom BancBoston imposed escrow account requirements similar to those imposed upon the Hoffmans. The Court's October 12, 1993 Order further required the counsel defendants to submit a proposed form of notice to the class members.

The Hoffman Action -- Notice to the Class

65. Pursuant to the October 12, 1993 directive from the Alabama Court, the counsel defendants submitted to the Court for its review and approval a proposed form of notice to the class members.

66. The proposed Notice to the Class submitted to the Court by the counsel defendants was deceptive, materially misleading, and fraudulent in that the counsel defendants misrepresented that the attorneys' fees requested by the counsel defendants would not exceed one-third of the economic benefit to the class when, in fact, the counsel

defendants knew that most, if not all, class members would pay attorneys' fees in an amount far in excess of one-third of the economic benefit received by them.

67. The proposed Notice to the Class submitted to the Court by the counsel defendants was deceptive, materially misleading, and fraudulent in that in the Notice the counsel defendants misrepresented that the settlement was "fair, reasonable, adequate, and in the best interests of the class," and that the attorneys' fees were "reasonable," when, in fact, the counsel defendants knew that the settlement was not fair, reasonable, adequate or in the best interests of the class and that the attorneys' fees were not reasonable.

68. The proposed notice to the Class submitted to the Court by the counsel defendants was deceptive, materially misleading, and fraudulent in that the counsel defendants failed to disclose to the Court or to plaintiffs that the counsel defendants, in their capacity as class counsel, intended to seek attorneys' fees in an amount exceeding the total monetary recovery of the class, and as a result, that most, if not all, class members would suffer a net out-of-pocket loss.

69. On October 26, 1993, the bank defendants filed in the Alabama Court Defendants' Notice of Filing Proposed Notice of Class Action and Defendants' Objections to Plaintiffs' Proposed Notice of Class Action. On October 25, 1993, the bank defendants served this pleading on the counsel

defendants via first-class mail. After it was filed, this pleading appears to have been withdrawn as moot.

70. In their Notice of Filing Proposed Notice of Class Action and Objections to Plaintiffs' Proposed Notice of Class Action, the bank defendants stated that the notice proposed by the counsel defendants was misleading in that, among other things:

(a) "[I]t misleads potential class members into believing that there are only 'benefits' of this litigation and fails to notify them that there are substantial adverse effects... that are certain to occur... [including]: (1) the monthly escrow payments of many borrowers will increase; (2) monthly escrow payments will fluctuate substantially from year to year as opposed to changing only slightly from year to year as they have in the past; (3) many borrowers will be called upon to make extraordinary additional payments to cover taxes and insurance because there will be insufficient funds in their escrow accounts to cover increases in taxes and insurance as they occur; (4) the risk that there will be insufficient funds in the escrow accounts will increase substantially, causing more borrowers to lose their houses as a result of inability to pay taxes or insurance; [and] (5) the cost of financing and refinancing will increase for all borrowers." Defendants' Notice of Filing Proposed Notice of Class Action and Defendants' Objections to Plaintiffs' Proposed Notice of Class Action, ¶ 2 at pgs. 4-5; and

(b) It fails to inform members of the *Hoffman* class that "if the Court orders a refund out of the escrow accounts... or these defendants [BancBoston Mortgage Corporation] change their accounting methods in order to comply with the Order and refund escrow funds, and plaintiffs' counsel seek attorneys' fees out of that refund, then every class member will suffer an actual net out-of-pocket loss as a result of this lawsuit. That loss will be paid to their lawyers." Defendants' Notice of Filing Proposed Notice of Class Action and Defendants' Objections to Plaintiffs' Proposed Notice of Class Action, ¶ 3 at p. 5.

71. On October 26, 1993, the bank defendants also filed their own Notice Of Class Action, which also appears thereafter to have been withdrawn as moot. The bank defendants' proposed Notice of Class Action included the following statement: "if fees and expenses [for Class Counsel] were paid out of the surplus fund [as proposed by Class Counsel], the amount of the refund paid to each class member would be reduced accordingly. Each Class member would have a net out-of-pocket loss as a result of this lawsuit and the settlement advocated by the Class Representatives and Class Counsel." Defendants' Proposed Notice of Class Action, at p. 4.

72. The attorneys' fees that the bank defendants later acquiesced to were determined pursuant to the precise method condemned by the bank defendants as described in ¶¶ 70 and 71 above, and the bank defendants' belief that if the

fees were calculated pursuant to that method, "every class member will suffer a net out-of-pocket loss as a result of this lawsuit" was entirely accurate.

The Hoffman Action -- The Settlement Negotiations

73. Before the Alabama Court entered its October 12, 1993 Order granting plaintiffs' motion for partial summary judgment, the bank defendants offered to settle the *Hoffman* Action by changing BancBoston's method of calculating escrow amounts to conform to the method advocated by the counsel defendants.

74. In particular, the bank defendants offered the counsel defendants the following proposal:

(a) BancBoston would change from an "individual item analysis" method of computing escrow payments to an "aggregate" method;

(b) If this change in the method of computing escrow payments resulted in a surplus in BancBoston's escrow deposit account, then BancBoston would refund to each class member the amount of the surplus; and

(c) BancBoston would pay from its own funds approximately $500,000 to cover all attorneys' fees and costs incurred by class counsel.

75. The net effect of the bank defendants' offer was that the *Hoffman* class members would not be responsible for the payment of any attorneys' fees and costs and would receive 100% of the surplus in their escrow accounts.

76. The counsel defendants rejected the bank defendants' offer to pay their attorneys' fees and, instead, insisted first, that attorneys' fees be a much larger amount than that offered by the bank defendants; second, that the attorneys' fees be paid not by the bank, but, rather, be taken from the individual escrow accounts of the *Hoffman* class members; and, third, that the bank defendants agree not to object to the counsel defendants' request for that amount of attorneys' fees to be taken from their clients' accounts.

77. The settlement agreed to by defendants in November 1993 called for the payment of attorneys' fees to the counsel defendants in a much larger amount than that offered by the bank defendants; for those attorneys' fees to be taken from the individual escrow accounts of the *Hoffman* class members; and for the bank defendants not to object to counsel defendants' request for that amount of fees to be taken from their clients' accounts.

78. In other words, defendants entered into an agreement that provided for payment of attorneys' fees in the very same manner as had been proposed in October 1993 by the counsel defendants, and to which the bank defendants then had objected because "every class member will suffer an

actual net out-of-pocket loss as a result of this lawsuit. That loss will be paid to their lawyers." Defendants' Notice of Filing Proposed Notice of Class Action and Defendants' Objections to Plaintiffs' Proposed Notice of Class Action, ¶ 3 at p. 5.

79. At the time that defendants entered into the settlement agreement calling for the payment of attorneys' fees from the individual escrow accounts of the *Hoffman* class members, each and every defendant knew that the settlement would result in an award of attorneys' fees in excess of the total economic benefit to the class; that most, if not all, class members would pay attorneys' fees in an amount far in excess of one-third of the economic benefit to him or her; and, as a result, that most, if not all, class members would suffer a net out-of-pocket loss.

80. In addition, at the time the defendants entered into the settlement agreement calling for the payment of attorneys' fees from the individual escrow accounts of the *Hoffman* class members, each and every defendant knew that the settlement would result in a payment of attorneys' fees to class counsel in an amount in excess of $14 million; that the settlement was not "fair, reasonable, adequate and in the best interests of the class;" and that the attorneys' fees to be awarded were not "reasonable."

The Hoffman Action -- The Settlement Terms

81. The terms of the settlement ultimately agreed to by the parties, memorialized in the Consent Decree dated January 24, 1994, and approved by the Alabama Court on the same date, included the following:

(a) An agreement by BancBoston to utilize in the future the "aggregate" or "cash" method of escrow account analysis, which defendants claimed would reduce by approximately 19% the amount of escrow funds BancBoston could hold;

(b) A one-time interest payment to each *Hoffman* class member in an amount ranging from $0.00 to $8.76; and

(c) A refund, prior to the termination of each class member's mortgage, of excess escrow funds in each class member's escrow account (approximately 19% of that class member's escrow account), from which would be deducted the attorneys' fees requested by the counsel defendants.

82. On December 3, 1993, H.U.D. published a Notice of Proposed Rulemaking establishing escrow accounting procedures under Sections 6(g) and 10 of RESPA. 58 Fed. Reg. 64066 (Dec. 3, 1993). On October 26, 1994, H.U.D. published regulations, effective May 24, 1995, establishing escrow accounting procedures under RESPA, 12

U.S.C. § 2601 *et seq.* 59 Fed. Reg. 53890 (Oct. 26, 1994). Under these regulations, BancBoston must apply the "aggregate" or "cash" method of escrow account analysis to all escrow account analyses conducted after October 26, 1997. This is the same relief that the settlement of the *Hoffman* Action achieved.

83. Because the excess escrow funds in each class member's account are indisputably already the property of that class member and always would be the property of that class member, the economic benefit of the refund of the excess escrow funds is not the amount of those funds, but, rather, is the economic benefit to the class member of receiving the money now, rather than at the termination of the mortgage.

84. In a letter to defendant Cottingham dated December 14, 1993, defendant Sharbrough confirmed that the actual economic benefit conferred upon the class as a result of the settlement was the difference between the value of receiving the refund of the escrow surplus "now," as compared with the value of receiving the escrow surplus later, at the termination of the mortgage.

85. Despite their knowledge that the true economic benefit to the class was the value of receiving the refund of the excess escrow amounts now rather than later, the terms of the settlement ultimately agreed to by the parties, memorialized in the Consent Decree dated January 24, 1994, and approved by the Alabama Court on the same date, awarded attorneys'

fees to the *Hoffman* class counsel calculated as 28% of the entire escrow surplus -- not the value of receiving the refund of that surplus now rather than later.

86. This resulted in far larger fees to the counsel defendants than had the fees been calculated on the basis of what all defendants knew was the true economic benefit to the *Hoffman* class (the value of the earlier availability of the surplus). The escrow surplus was estimated to be approximately 19% of BancBoston's entire $223 million escrow account, resulting in attorneys' fees of at least $14 million.

87. Thus, the counsel defendants received as attorneys' fees in the *Hoffman* Action not 28% of the actual economic benefit to the class, but 28% of the excess escrow funds that always had belonged and always would belong to the class.

The Scheme

88. By misrepresenting to the Court the ultimate economic effect of the *Hoffman* Action on the class members, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties induced the Alabama Court to assume jurisdiction over the nationwide class.

89. On November 19, 1993, defendants memorialized the settlement agreement into which they had

entered by filing with the Alabama Court a Joint Motion and Stipulation in which they asked the Court, among other things, (a) to approve conditionally the settlement class as all persons whose loan was secured by residential real estate mortgage and for whom defendants or their predecessors acted as servicer at any time from May 28, 1981 to the present; (b) to grant tentative approval of a proposed Consent Decree prepared by defendants and submitted by them to the Court; and (c) to approve the Notice of Hearing on Proposed Settlement of Class Action prepared by defendants for the purported purpose of informing the *Hoffman* class of the proposed settlement.

90. Under the Alabama Rules of Civil Procedure, a class action cannot be dismissed or compromised without court approval. Thus, to obtain the Court's approval of their proposed Consent Decree and Notice of Hearing on Proposed Settlement of Class Action, and in order to ensure that the counsel defendants would be awarded the exorbitant fees that they sought, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties omitted from their Joint Motion and Stipulation, from the Consent Decree, and from the Notice of Hearing on Proposed Settlement of Class Action attached to the Joint Motion and Stipulation, any mention of the fact that the agreement into which they entered, if approved and enforced by the Court, would result in a net out-of-pocket loss to most, if not all, class members, and that the attorneys' fees taken from the individual escrow accounts of the class members would far

exceed one-third of the economic benefit to the individual class members.

91. Instead, defendants falsely represented to the Court in their Joint Motion and Stipulation that "[t]he proposed settlement is fair, reasonable and adequate in light of the substantial benefits offered to plaintiffs and the class members by defendants as compared to the uncertainties of litigation of the claims involved, the significant cost, time and effort such litigation would entail on behalf of all parties regardless of the outcome, and the considerable burden that continued litigation would impose upon the Court and upon the relationship that exists between the plaintiffs, the class members and defendants." Joint Motion and Stipulation, ¶ 3 at p. 3.

92. To ensure that the counsel defendants would be awarded the exorbitant attorneys' fees that they sought, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties prepared and filed with the Court a Notice of Hearing on Proposed Settlement of Class Action that contained deceptive, materially misleading, and false representations and statements of fact, or omitted to state material facts, by stating, among other things, that:

(a) "Counsel for the class have determined that the proposed settlement is fair, reasonable, adequate and in the best interests of the class," Notice of Hearing on

Proposed Settlement of Class Action, at p. 2, when, in fact, defendants knew that the proposed settlement was structured so as to result in a payment of at least $14 million in attorneys' fees to the counsel defendants from the individual escrow accounts of the class members, while most, if not all, class members would suffer a net out-of-pocket loss;

(b) By participating in the class settlement, members of the class would be entitled to and would receive monetary distributions, when, in fact, the defendants knew that the net result of the settlement would not be a monetary distribution to each class member, but a monetary loss to most, if not all, class members; and

(c) Stated that the counsel defendants would request attorneys' fees to be paid out of each escrow account based upon a percentage not to exceed one-third of the "economic benefit" to the class, Notice of Hearing on Proposed Settlement of Class Action, ¶ 8 at p. 5, when, in fact, defendants knew that each member of the *Hoffman* class who had an escrow account at the time of the settlement would pay attorneys' fees in an amount far in excess of one-third of his or her economic benefit.

93. At the time they prepared and filed their proposed Notice of Hearing on Proposed Settlement of Class Action, defendants knew that if the proposed notice clearly informed class members that the settlement agreement would result in a net monetary loss for most, if not all, class

members, and that each individual class member would pay attorneys' fees in an amount far exceeding one-third of the economic benefit received by that class member, then most, if not all, class members either would have opted out of the class or would have objected to the terms and conditions of the settlement, thereby reducing the amount of attorneys' fees available to the counsel defendants.

94. On December 6, 1993, the Alabama Court entered an Order conditionally approving the settlement class and tentatively approving the Consent Decree prepared and submitted jointly by defendants in this action.

95. In its December 6, 1993 Order, the Alabama Court ordered BancBoston to send to the last known address of each member of the *Hoffman* class a copy of the Notice of Hearing on Proposed Settlement of Class Action that had been prepared jointly by the defendants in this case.

96. On December 9 and 10, 1993, in furtherance of their scheme to defraud, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties sent or caused to be sent through the Untied States mail approximately 415,000 copies of the 12-page, single-spaced Notice of Hearing on Proposed Settlement of Class Action containing the deceptive, materially misleading, and false statements, or omitting to state material facts, as set forth in paragraph 92 above.

97. On December 13, and 20, 1993, in furtherance of their scheme to defraud, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties caused to be published in *USA Today* a Notice of Hearing on Proposed Settlement of Class Action containing the deceptive, materially misleading, and false statements, or omitting to state material facts, as set forth in paragraph 92 above.

98. After sending out approximately 415,000 deceptive, materially misleading, and false Notices to past and current holders of BancBoston mortgages, and after publishing two similarly deceptive, materially misleading, and false Notices in *USA Today,* defendants Ezell & Sharbrough, Ezell, and Sharbrough fielded thousands of telephone calls and replied to hundreds of letters from Class Members requesting additional information regarding the proposed settlement.

99. In responding to such telephone calls and letters, it is inevitable that defendants Ezell & Sharbrough, Ezell, and Sharbrough knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties continued to use the Untied States mail and interstate wires to make deceptive, materially misleading, and false statements regarding the settlement in that they inevitably continued to make representations intended to deceive class members into believing that they would receive a monetary benefit from the settlement and that their attorneys would only receive one-third of that economic benefit; to conceal from their clients

that the settlement would result in a net out-of-pocket loss for most, if not all, of them; and to conceal that the counsel defendants would be awarded attorneys' fees taken from the individual escrow accounts of each class member in an amount far exceeding one-third of the economic benefit received by each class member.

100. Due to the deceptive, materially misleading, and false representations in the Notices mailed to class members and published in *USA Today*, only 1,500 potential class members, less than 0.4% of the potential class, requested that they be excluded from the class prior to the January 3, 1994 cut-off date for filing Requests for Exclusion (and many of these 1,500 potential class members appear to have "opted-out" by mistake), despite the fact that most, if not all, of the class members would suffer a net out-of-pocket loss as a result of their participation in the *Hoffman* Action.

101. The Alabama Court held a fairness hearing regarding the fairness, reasonableness, and adequacy of the proposed settlement on January 10 and 11, 1994. During that fairness hearing, defendants testified and presented expert testimony that the economic benefit to the class was at least equivalent to the amount of the escrow funds to be refunded to the members of the *Hoffman* class rather than the much smaller value of receiving that refund now as opposed to receiving it later when the mortgage was paid off. By knowingly, intentionally, recklessly, negligently and in wanton breach of their fiduciary duties exaggerating the

economic benefit to the *Hoffman* class, the counsel defendants obtained an excessive, exorbitant, and unwarranted award of attorneys fees calculated as a percentage of the exaggerated "economic benefit" to the *Hoffman* class.

102. At no time during their respective arguments before the Court during that fairness hearing did any of the defendants inform the Court that because of the manner in which defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties had exaggerated and miscalculated the economic benefit to the *Hoffman* class that the settlement agreement into which they had entered, if approved by the Court, would result in a net out-of-pocket loss to most, if not all, class members, or that each individual class member would pay attorneys' fees in an amount that would far exceed one-third of his or her economic benefit; nor did any of the defendants inform the Court of the materially misleading and false statements within the Notice of Hearing on Proposed Settlement of Class Action prepared and submitted to the Court by defendants.

103. Instead, during the January 10 and 11, 1994 fairness hearing, defendants knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties represented to the Court, as they had in the Joint Motion and Stipulation itself, that the settlement agreement into which they had entered was fair to the members of the class and that the attorneys' fees were reasonable. In fact, defendants knew that the settlement would result in a payment of attorneys' fees

to counsel defendants from the individual escrow accounts of the class members in an amount in excess of $14 million, while most, if not all, class members would suffer a net out-of-pocket loss, and that each individual class member would pay attorneys' fees far exceeding one-third of the economic benefit to that class member.

104. On January 24, 1994, having concealed from the Court and the members of the *Hoffman* class the true monetary impact of the settlement on the Class Members, defendants secured the Court's approval of the settlement. The Court specifically found the settlement to be fair and reasonable and the requested attorneys' fees to be reasonable in light of fees awarded in other cases.

105. After fraudulently obtaining the Court's approval of the settlement, defendants implemented the terms and conditions of the settlement and knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties took the following actions in furtherance of their scheme:

(a) Within 90 days of the Court's approval of the settlement, defendant BancBoston made an electronic deposit, in an amount calculated in accordance with paragraph 8 of the Consent Decree, to the account of each class member who was a current BancBoston mortgage holder. Paragraph 8 of the Consent Decree provided that Subclass Number One plaintiffs would receive an interest payment calculated as "an

amount equal to fifty percent (50%) multiplied by seven point five (7.5) multiplied by (four (4) percent minus the interest rate paid on escrow, if any), multiplied by the average escrow surplus, which has been determined to be $58.41." These payments are believed to have ranged from $0.0 to $8.76.

(b) Beginning 90 days after the Court's approval of the settlement and continuing throughout the end of 1994, defendant BancBoston began deducting attorneys' fees from the escrow accounts of each of BancBoston's current mortgage holders in the amount of 5.32% of the balance of the account. This represented 28% of the 19% of BancBoston's escrow accounts that had been determined to be excessive surplus.

(c) After the attorneys' fees were deducted from each account, an amount believed to be in excess of $14 million was paid by BancBoston to defendants Ezell & Sharbrough, Ezell, and Sharbrough, who later distributed an unknown portion of those funds to defendants Edelman & Combs, Edelman, Lawrence Walner & Associates, and Walner; and

(d) In January 1995, 1994 Annual Tax and Interest Statements for 1994 were mailed by defendant BancBoston to each of its current mortgage holders listing a deduction labeled only as a "miscellaneous disbursement." Each class member's individual disbursement was in an amount well in excess of the one-third of the economic benefit

received by that class member, and therefore, well in excess of the amount represented in the Notice of Hearing on Proposed Settlement of Class Action. The disbursement, in fact, was a payment of attorneys' fees to the counsel defendants, and the bank defendants' denominating it as a mere "miscellaneous disbursement" was a further act of fraud and deception designed to conceal the scheme from plaintiffs.

106. After BancBoston mailed the 1994 Annual Tax and Interest Statements to plaintiffs in January 1995 and continuing through at least March 30, 1995, the bank defendants, in furtherance of defendants' scheme to defraud plaintiffs, knowingly, intentionally, recklessly, negligently, and in wanton breach of their fiduciary duties sent letters containing deceptive, misleading, and false statements to members of the *Hoffman* class who inquired about the "miscellaneous disbursements."

107. The letters sent by the bank defendants through the United States Mail, in furtherance of defendants' scheme to defraud plaintiffs and in an attempt to lull plaintiffs into a false sense of security, contained deceptive, materially misleading, and false representations and statement of fact, or omitted to state material facts, in that they:

(a) Failed to disclose that under Alabama law defendants Bank of Boston and BancBoston could have been obligated to pay attorneys' fees to the counsel defendants;

(b) Failed to acknowledge that Bank of Boston and BancBoston benefitted financially from the settlement because the settlement agreement provided for the payment of attorneys' fees from the individual escrow accounts of the *Hoffman* class members rather than by Bank of Boston and BancBoston themselves; and

(c) Cited decisions of the Alabama Supreme Court as support for the notion that an award of attorneys' fees in the range of 20%-33⅓% of the economic benefit to the class is appropriate in class action litigation, when defendants knew that most, if not all, members of the *Hoffman* class would pay attorneys' fees far in excess of that amount.

ALLEGATIONS UNDER 18 U.S.C. §§ 1961, et seq.

108. Plaintiffs Dexter J. Kamilewicz, Gretchen L. Kamilewicz, and Martha E. Preston are each a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

109. Each defendant is a "person" within the meaning of 18 U.S.C. §§ 1961(3), 1962(c), and 1962(d).

110. The *Hoffman* class, as defined in ¶ 3 of the Consent Decree approved by the Alabama Court on December 6, 1993, constitutes an association-in-fact "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c) (the "*Hoffman* Class Enterprise"). The activities of the *Hoffman* Class Enterprise affected interstate commerce.

111. Defendants are persons who are associated with and/or employed by the *Hoffman* Class Enterprise and who conducted or participated in, directly or indirectly, the conduct of the *Hoffman* Class Enterprise's affairs, as those affairs related to the transactions and occurrences described in paragraphs 88 through 107 of this Complaint, through a pattern of racketeering within the meaning of 18 U.S.C. §§ 1961(1)(B) and 1961(5).

112. The schemes and artifices to defraud described above in paragraphs 88 through 107 of this Complaint constituted a close-ended scheme comprised of numerous acts of mail and wire fraud, all of which were intended to, and did, defraud plaintiffs over a substantial period of time, beginning in June 1991 and continuing though at least March 1995.

COUNT I

Against All Defendants for Damages Under 18 U.S.C. §§ 1962(c) and 1964(c)

113. Paragraphs 1 through 112 are incorporated by reference herein as if they fully were alleged herein.

114. Defendants, among themselves and in combination and concert with others, known and unknown, devised and intended to devise a scheme and artifice to defraud plaintiffs in order to obtain money from plaintiffs by means of false and fraudulent pretenses, representations, and promises.

115. For the purpose of executing and furthering their scheme and artifice to defraud plaintiffs and in order to obtain money from plaintiffs by means of false and fraudulent pretenses, representations, and promises, defendants knowingly used the United States Mail and interstate wire communications for communications to the Alabama Court, for communications to and from members of the *Hoffman* class, and for communications to and from each other, in violation of 18 U.S.C. §§ 1341 and 1343, on numerous occasions beginning in June 1991 and continuing at least through March 1995, in that they caused the communications described in this Complaint to be placed in an authorized depository for mail and to be sent and delivered by the Postal Service, and cause such communications to be transmitted in interstate commerce by means of wire facilities, and took and received from the mail and interstate wire facilities communications sent by plaintiffs. Such use of the mail and interstate wire facilities by defendants in execution of the scheme and artifice to defraud plaintiffs by means of false and fraudulent pretenses, representations, and promises constitutes a pattern of racketeering activity, as defined in 18 U.S.C. § 1961(5).

116. By reason of their scheme and artifice to defraud, defendants violated the provisions of 18 U.S.C. § 1962(c), and as a result of this violation, defendants caused direct injury to the property of plaintiffs in an amount to be determined at trial.

COUNT II

Against All Defendants for Damages Under 18 U.S.C. §§ 1962(d) and 1964(c)

117. Paragraphs 1 through 116 are incorporated by reference herein as if they fully were alleged herein.

118. Beginning in June 1991 and continuing through at least March 1995, defendants violated 18 U.S.C. § 1962(d) by conspiring to violate 18 U.S.C. § 1962(c), in that each of these defendants knowingly conspired to defraud plaintiffs by knowingly participating in the conduct of the affairs of the *Hoffman* Class Enterprise through a pattern of racketeering activity.

119. Each of the defendants knew that numerous acts of mail and wire fraud would be committed under the auspices of the *Hoffman* Class Enterprise and agreed to their commission.

120. Each of the defendants was aware of the specific identities and activities of each of the other defendants.

121. By engaging in the conspiracy to defraud alleged herein, the defendants have violated 18 U.S.C. § 1962(d) and have caused direct injury to the property of plaintiffs in an amount to be determined at trial.

COUNT III

Against Defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 for Damages Under 42 U.S.C. § 1983

122. Paragraphs 1 through 121 are incorporated by reference herein as if they fully were alleged herein.

123. By engaging in the scheme and artifice to defraud described in paragraphs 88 through 107 of this Complaint, the counsel defendants deprived plaintiffs of their property without due process of law and deprived plaintiffs of rights, privileges or immunities secured by the United States Constitution and laws of the United States.

124. The counsel defendants knowingly took over, controlled, and abused the legal process by fraudulently obtaining the Court's approval of the class settlement and by implementing the terms of that settlement. As a result, plaintiffs maliciously and unconstitutionally were deprived of their property without due process of law.

125. The conduct of the counsel defendants in furtherance of their scheme to deprive plaintiffs of their property without due process of law was committed by persons acting under color of state law, as demonstrated by, but not limited to, the following:

(a) In furtherance of their scheme, the counsel defendants took over and controlled the judicial process by fraudulently obtaining the requisite court approval of the class settlement;

(b) The counsel defendants willfully and maliciously violated plaintiffs' civil rights through the knowing abuse of the legal process;

(c) The *Hoffman* Action, like all class action litigation in Alabama, could not have existed without the overt, significant participation of the state, including the trial judge, who has a fiduciary duty to protect the interests of absent class members. More specifically, without the participation of the Court, the *Hoffman* Action settlement could not have been approved and implemented; and

(d) The counsel defendants acted in the capacity of private attorneys general in representing the *Hoffman* class members and performed a governmental function in litigating public policy issues on behalf of a large constituency.

126. By reason of this conduct, pursuant to 42 U.S.C. §§ 1983 and 1988, plaintiffs are entitled to recover from the counsel defendants their actual damages, attorneys' fees, and costs in an amount to be determined at trial.

COUNT IV

Against All Defendants For Common Law Fraud

127. Paragraph 1 through 126 are incorporated by reference herein as if they fully were alleged herein.

128. Defendants made deceptive, materially misleading, and false statements, and omitted to state material facts, as more fully described above, knowingly, willfully, and with the intent to defraud plaintiffs.

129. Plaintiffs justifiably relied upon the deceptive, materially misleading, and false statements and omissions made by defendants.

130. As a result of their justifiable reliance upon the representations made to them by defendants, plaintiffs have suffered monetary injury in an amount to be determined at trial.

131. By reason of defendants' fraudulent conduct, plaintiffs are entitled to recover from defendants all damages proximately caused by defendants' fraudulent conduct, exemplary damages, interest, costs, and attorneys' fees in an amount to be determined at trial.

COUNT V

Against All Defendants for Common Law Fraudulent Concealment

132. Paragraph 1 through 131 are incorporated by reference herein as if they fully were alleged herein.

133. Defendants made deceptive, materially misleading, and false statements, and omitted to state material facts, as more fully described above, knowingly, willfully, and with the intent to conceal from plaintiffs material facts regarding the proposed settlement of the *Hoffman* Action.

134. In their capacity as class counsel in the *Hoffman* Action, the counsel defendants owed plaintiffs a duty to disclose all material facts. The counsel defendants breached this duty in order to maximize the attorneys' fees that they would receive.

135. In their capacity as fiduciaries, the bank defendants were obligated to disclose to plaintiffs all material facts and to protect their customers' escrow accounts from being unlawfully depleted. The bank defendants breached this duty in order to ensure that Bank of Boston and BancBoston would not have to pay the attorneys' fees themselves.

136. As a result of defendants' fraudulent concealment of material facts, plaintiffs suffered monetary injury in an amount to be determined at trial.

137. Plaintiffs are entitled to recover from defendants all damages proximately caused by defendants' conduct, exemplary damages, interest, costs, and attorneys' fees in an amount to be determined at trial.

COUNT VI

Against All Defendants for Negligent Misrepresentation

138. Paragraphs 1 through 137 are incorporated by reference herein as if they fully were alleged herein.

139. Defendants negligently made materially misleading, deceptive, and false statements, and omitted to state material facts, as more fully described above.

140. Plaintiffs justifiably relief upon the materially misleading and false statements and omissions made by defendants.

141. As a result of their justifiable reliance upon the representations made to them by defendants, plaintiffs have suffered monetary injury in an amount to be determined at trial.

142. By reasons of defendants' negligent conduct, plaintiffs are entitled to recover from defendants all damages proximately caused by defendants' negligent conduct, interest, costs, and attorneys' fees in an amount to be determined at trial.

COUNT VII

Against Defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 for Attorney Malpractice

143. Paragraphs 1 through 142 are incorporated by reference herein as if they fully were alleged herein.

144. As counsel for the *Hoffman* class, the counsel defendants were under a duty to exercise that level of care and diligence that other similarly situated legal service providers ordinarily would exercise in order to protect the rights and interests of the class members.

145. Through their conduct in the *Hoffman* Action, the counsel defendants breached the standard of care that they owed to plaintiffs and committed professional malpractice.

146. By charging excessive, exorbitant, and unwarranted attorneys' fees through fraud, deception, and negligence, the counsel defendants breached the standard of care that they owed to plaintiffs and committed professional malpractice.

147. As a result of the counsel defendant's wanton breach of the standard of care owed to plaintiffs, plaintiffs suffered monetary injury and are entitled to recover from the counsel defendants all damages proximately caused by

defendants' conduct, exemplary damages, interest, costs, and attorneys' fees in an amount to be determined at trial.

COUNT VIII

Against Defendants Ezell & Sharbrough, Ezell, Sharbrough, Edelman & Combs, Edelman, Lawrence Walner & Associates, Walner, and John or Jane Does 26-50 for Breach of Fiduciary Duty

148. Paragraphs 1 through 147 are incorporated by reference herein as if they fully were alleged herein.

149. As counsel for the *Hoffman* class, the counsel defendants owed a fiduciary duty to their clients.

150. Through their conduct in the *Hoffman* Action, the counsel defendants breached the fiduciary duty that they owed to their clients.

151. By charging excessive, exorbitant, and unwarranted attorneys' fees through fraud, deception, and negligence, the counsel defendants breached the fiduciary duty that they owed to plaintiffs.

152. As a result of the counsel defendants' wanton breach of their fiduciary duty, plaintiffs suffered monetary injury and are entitled to recover from the counsel defendants all damages proximately caused by defendants' conduct, exemplary damages, interest, costs, and attorneys' fees in an amount to be determined at trial.

COUNT IX

Against Defendants Bank of Boston Corporation and BancBoston Mortgage Corporation for Conversion

153. Paragraphs 1 through 152 are incorporated by reference herein as if they fully were alleged herein.

154. As set forth more fully in paragraphs 88 through 107 of this Complaint, defendants Bank of Boston and BancBoston participated with the other defendants in a scheme and artifice to defraud the members of the *Hoffman* class.

155. Having fraudulently obtained the Court's approval of the settlement, defendants Bank of Boston and BancBoston deducted from the accounts of each of their current mortgage holders 5.32% of the escrow account of each such account in order to pay attorneys' fees to the counsel defendants.

156. The deduction of such funds from the escrow accounts of their mortgage holders constituted an improper use of those escrow funds by Bank of Boston and BancBoston.

157. As a result of the scheme devised and implemented by defendants Bank of Boston and BancBoston and the resultant improper use of the escrow funds by Bank of Boston and BancBoston, plaintiffs have suffered a monetary injury and are entitled to recover from the bank defendants all

damages proximately caused by defendants' conduct, exemplary damages, interest, costs, and attorney's fees in an amount to be determined at trial.

COUNT X

Against Defendants Bank of Boston Corporation and BancBoston Mortgage Corporation for Breach of Fiduciary Duty

158. Paragraph 1 through 157 are incorporated by reference herein as if they fully were alleged herein.

159. Defendants Bank of Boston and BancBoston owed plaintiffs a fiduciary duty to safeguard their escrow funds, and to see to it that those escrow funds were used only in strict compliance with the terms and conditions of the escrow agreement into which they entered with plaintiffs.

160. Having fraudulently obtained the Court's approval of the settlement, defendants Bank of Boston and BancBoston deducted from the accounts of each of its current mortgage holders 5.32% of the escrow balance for each such account in order to pay attorneys' fees to the counsel defendants.

161. The deduction of such funds from the escrow accounts of their mortgage holders constituted an improper use of those escrow funds by Bank of Boston and BancBoston.

162. Through their conduct in the *Hoffman* Action, Bank of Boston and BancBoston intentionally and recklessly disregarded plaintiffs' rights.

163. As a result of Bank of Boston and BancBoston's breach of their fiduciary duty to plaintiffs, plaintiffs and other members of the *Hoffman* class have suffered monetary injury and are entitled to recover from defendants Bank of Boston and BancBoston all damages proximately caused by those defendants' conduct, exemplary damages, interest, costs, and attorneys' fees in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs demand a trial by jury and demand judgment against defendants as follows:

1. For certification of a class of plaintiffs as defined above, for designation of this suit as a class action, and for such relief and orders as are necessary to prosecute this action as class litigation.

2. As to the claims set forth in Count I and Count II:

(a) For three-fold the damages sustained by plaintiffs and other members of the class;

(b) For costs of suit, interest, and reasonable attorneys' fees; and

(c) For such further relief as the Court deems just.

3. As to the claims set forth in Count III and Count VI:

(a) For the damages sustained by plaintiff and other members of the class;

(b) For costs of suit, interest, and reasonable attorneys' fees; and

(c) For such further relief as the Court deems just.

4. As to the claims set forth in Count IV, Count V, Count VI, Count VII, Count VIII and Count IX:

(a) For the damages sustained by plaintiffs;

(b) For exemplary damages;

(c) For costs of suit, interest, and reasonable attorneys' fees; and

(d) For such further relief as the Court deems just.

/s/ Anne G. Kimball
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Dated: November 2, 1995

NOT FOR PUBLICATION

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CARL F. HOFFMAN and DEBORAH L. HOFFMAN, Plaintiffs, v. BANCBOSTON MORTGAGE CORPORATION and BANK OF BOSTON CORPORATION, Defendants, v. DEXTER J. KAMILEWICZ, GRETCHEN L. KAMILEWICZ and MARTHA E. PRESTON, Respondents.	No. CV-91-1880 January 30, 1996

KITTRELL, Circuit Court Judge.

ORDER

A. Procedural Background

On January 24, 1994, this Court entered an Order of Settlement Approval and Final Judgment in this action (the

"Order of Settlement"). This Court retained jurisdiction of this action for the purpose of issuing any and all orders or decrees as may be necessary to effectuate, clarify, modify, or enforce the purpose, intent and terms of the Consent Decree. Even apart from this express reservation of jurisdiction, by operation of law, a Circuit Court retains jurisdiction of a matter to issue such orders as necessary to effectuate its judgments. *Mayhan v. Mayhan*, 395 So. 2d 1022 (Ala. Civ. App. 1981).

On November 2, 1995, Dexter J Kamilewicz, Gretchen L. Kamilewicz, and Martha Preston ("Respondents") filed a complaint (CV-95-C 6341) in the United States District Court for the Northern District of Illinois Eastern Division (the "Federal Class Action"). The Federal Class Action essentially alleged that the defendants in this action (the *Hoffman* case)—BancBoston Mortgage Corporation and Bank of Boston Corporation (hereinafter collectively "BancBoston") along with their counsel Burr & Forman, and T. Thomas Cottingham (hereinafter collectively "Bank Counsel")—conspired with class counsel to defraud the Court as to the "economic benefit" conferred upon the class by the settlement so that class counsel could recover enormously excessive fees. The Federal Class Action sought to certify as a class all those who had been class members in the *Hoffman* case. Respondents filed their action in federal court notwithstanding this Court's express reservation of jurisdiction. (Consent Decree, paragraph 20).

On November 22, 1995, class counsel in the *Hoffman* case (who were also defendants in the Federal Class Action) filed a motion seeking an order directing Respondents to come forward and show cause why they are not bound by the Order of Settlement which approved the class action settlement in the *Hoffman* case and awarded attorneys' fees to class counsel. On December 4, 1995, this Court granted class counsel's motion and ordered Respondents to appear on December 18, 1995. On December 15, 1995, United States District Judge Paul Plunkett dismissed the Federal Class Action, holding that he lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine. On December 18, 1995, this Court held a hearing on the show cause motion. Class counsel for the Bank of Boston appeared. Charles H. Hillman, Esq. appeared at the hearing and stated, that, while he was not making an "appearance" on their behalf, the Respondents would not be present at the hearing.

B. Statement of the Case

This case was commenced in May of 1991 when Carl and Deborah Hoffman filed a class action complaint in this court alleging, *inter alia*, that the Bank of Boston and its wholly owned subsidiary, BancBoston Mortgage Corporation, required mortgagors to deposit excessive sums in their mortgage escrow accounts.

The Bank of Boston and BancBoston Mortgage Corporation were represented in this case by Burr & Forman, a Birmingham, Alabama law firm and T. Thomas Cottingham

of that firm. The Hoffmans and the class were represented by the Mobile law firm of Ezell & Sharbrough, L.L.C. and Mark Ezell, John W. Sharbrough, III, Sarah H. Stewart of that firm, Daniel A. Edelman, of Edelman & Combs of Chicago, Illinois, and Lawrence Walner of Lawrence Walner and Associates, also of Chicago, Illinois.

Following various pretrial motions and rulings of this Court, the parties presented a proposed consent decree to the court setting forth a nationwide class settlement of this matter. On December 6, 1993, pursuant to Rule 23 of the Alabama Rules of Civil Procedure, this Court entered its order preliminarily approving the terms of the settlement and directing that the court approved notice be mailed to each class member. On November 24, 1993, the Attorney General of Florida filed a motion to intervene in this matter for the purpose of objecting to the proposed settlement and attorney's fees. That motion was granted, over the objection of class counsel.

A Fairness Hearing was held, after notice to the class, on January 10 and 11, 1994. During the Fairness Hearing, this Court engaged in a judicial inquiry to determine the fairness of the proposed settlement and the amount, if any, to be awarded to class counsel as attorneys' fees. After hearing the evidence and arguments of counsel, including evidence and vigorous arguments of the Florida Attorney General who intervened to represent absent class members, and the report of Therese Green, Esq., the special master appointed to review

the settlement, this Court entered a Consent Decree and an Order of Settlement Approval and Final Judgment on January 24, 1994. In the Order of Settlement, the Court awarded class counsel attorney's fees based on the economic benefit to the class. Thereafter, the settlement was implemented. Class counsel has continued to monitor the settlement and assist class members with their questions and concerns.

On or about March 9, 1995, Dexter J. Kamilewicz wrote this Court expressing his dissatisfaction with the proceedings in this case. Mr. Kamilewicz sent copies of that letter to a number of person [sic] including members of congress and the governor of Maine. He complained generally about the Court's decision approving the settlement and specifically that class counsel would "profit" from the case. He did not set forth, however, any evidence, knowledge or information of fraudulent conduct by any of the parties or attorneys in this litigation. The Court referred Mr. Kamilewicz's letter to John W. Sharbrough, III, Esq., and directed Mr. Sharbrough to answer Mr. Kamilewicz's letter and report back to the Court. On April 17, 1995, Mr. Sharbrough wrote to the Court and explained that Maine Senator William Cohen's office had also contacted him regarding Mr. Kamilewicz. Mr. Sharbrough further explained that he had requested more information from Mr. Kamilewicz but had not received a reply. Additionally, Mr. Cottingham of Burr & Forman wrote Mr. Kamilewicz a lengthy letter

explaining the settlement and addressing Mr. Kamilewicz's concerns. The Federal Action was then filed by Respondents.

C. The Hearing

This matter came before the Court in a hearing held on December 18, 1995. The purpose of this hearing was two fold. The first purpose was to hear the issues raised by class counsels' motion for order to show cause. Second, this Court treated Respondents federal court allegations as an independent action under Alabama Rule of Civil Procedure 60(b) to set aside the Order of Settlement. Respondents and their counsel in the Federal Class Action failed to appear before this Court at the hearing as ordered. This Court notes that there can be no question that Respondents and their counsel had actual notice of the hearing. Respondents filed a motion for a temporary restraining order in the Federal Class Action seeking to enjoin this Court from holding a hearing. Additionally, Respondents and their counsel sent Mr. Hillman to the hearing for the limited purpose of informing the Court that they would not be appearing and that they contest this Court's personal jurisdiction over Respondents. The case action summary also reflects that Notice of the hearing was served on the Respondents by certified mail prior to the date of the hearing.

As discussed below, this Court does have personal jurisdiction over the Respondents, and Respondents have stated no other reason for their failure to appear. By their own allegations in the Federal Class Action, Respondents Dexter J.

Kamilewicz and Gretchen L. Kamilewicz live in Maine while Respondent Martha Preston lives in Wisconsin. Thus, Respondents only connection with the State of Illinois appears to be the fact that some of Respondents' counsel reside there. Undeniably, the nexus with Alabama, the forum for the original action, is stronger and, if Respondents have the resources to pursue an action in Illinois, it is reasonable to conclude that they have the resources to appear for a hearing in Alabama. This Court's Order of December 4, 1995 specifically provides that Respondents would be "given the opportunity to present evidence and testimony in support of their allegations." In dismissing the Federal Class Action, Judge Plunkett also believed that this Court is the proper forum for Respondents to raise their claims. Judge Plunkett stated that Respondents' claim to the contrary "makes little sense." (Federal Class Action Order dated December 15, 1995 at p. 14).

D. Respondents' Contentions

1. Lack of Jurisdiction

Respondents have asserted that this Court does not have personal jurisdiction over them. "A forum state may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant so long as the forum state provides minimal procedural due process protection." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1983).

Shutts defines this due process as requiring 1) that the plaintiff receive the best practicable notice of the pendency of the action; 2) that the plaintiff be provided an opportunity to be heard; 3) that the plaintiff be provided an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form; and, 4) adequate representation by the named plaintiff. *Id.* at 806-14. Alabama courts have followed *Shutts* and held that res judicata prevents relitigating claims by absent class members if an opt out form is provided. *See Martin v. Drummond Company, Inc.*, 1995 WL 396879 (Ala. 1995). Having reviewed the *Shutts* jurisdictional requirements, the Court holds that they have been satisfied in this case.[1] Respondents' claims that this Court lacks jurisdiction over them are meritless.[2]

2. Fraud on the Court in Prior Proceedings

This Court provided Respondents with an opportunity to present evidence in support of their claims raised in the

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[1] The Court notes that it has addressed the jurisdiction issue on two prior occasions. On December 6, 1993 this Court gave preliminary approval to the notice as to content and as to manner of service and publication. On January 24, 1994, this Court gave final approval to the notice and specifically held that due process had been satisfied. (Order of Settlement at ¶ A).

[2] Though not specifically addressed in Judge Plunkett's order, the holding that this Court had personal jurisdiction over Respondents was implicit in his ruling dismissing the case which in effect left this Court as the remaining available forum.

Federal Class Action. Respondents bore the burden of proving their allegations but have refused the opportunity and leave the Court with no option other than to reexamine the evidence presented at the Fairness Hearing as well as the pleading filed in the *Hoffman* case and the proceedings prior to the Fairness Hearing. Having freshly reviewed that evidence, those pleadings, and the prior proceedings, this Court finds no evidence of fraud on this Court as alleged by Respondents. Additionally, this Court finds that the substance of Respondents arguments concerning "economic benefit" and the possible "net loss" to some class members was raised, argued and briefed by the Florida Attorney General's office. Therefore, these arguments have already been fully adjudicated and decided by this Court.

Class counsel adequately represented the class throughout this litigation and at the Fairness Hearing. The interests of the absent class members, in so far as it conflicted with class counsel's fee request was zealously represented by the Attorney General of California (who had filed a similar action against the defendants and was familiar with the subject matter of the case). Other than the personal appearance of each class member (over 400,000 persons), nothing more could have been done to protect the interest of the Respondents or the class. The Order of Settlement is reapproved in its entirety. Respondents are bound by the

terms of the Order of Settlement and are precluded from raising the claims set forth in the Federal Class Action.[3]

Having found that there was no fraud on the Court perpetrated by any of the defendants in the Federal Class Action, this Court also holds that Respondents' claims against BancBoston and Bank Counsel fail for, at least, four other reasons: 1) BancBoston and Bank Counsel owed no duty to Respondents to protect them from alleged overreaching by their own counsel; 2) BancBoston and Bank Counsel lacked standing to object to the payment of attorneys' fees; 3) BancBoston and Bank Counsel did not make any affirmative representations concerning the reasonableness of the attorneys' fees awarded to class counsel or as to the definition of "economic benefit"; and 4) BancBoston and Bank Counsel have been released from the claims asserted by Respondents and Respondents have failed to tender the benefits of that release.

The fiduciary duties of an escrow agent are limited to those which they have assumed under the escrow contract.

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[3] In addition, this Court holds that the class received a benefit under the settlement even if class counsels' definition of "economic benefit" were wrong. For example, it is unquestioned that the accounting method used to determine escrow balances was changed to a system that, on average, requires lower balances. Other benefits to the class are set forth in Order of Settlement. Thus, even if *Shutts* can be read as requiring a benefit to the class as a requirement of jurisdiction, the class unquestionably received a benefit.

Gurley v. Bank of Huntsville, 349 So.2d 43, 45-6 (Ala. 1977). BancBoston and Bank Counsel assumed no duty to protect class members from the very attorneys who sued BancBoston on their behalf. "[I]n a class action suit, where a lump sum settlement has been negotiated and attorney fees have been awarded from the fund, the defendant ordinarily has no standing to object to the fee award because it no longer has an interest in the fund." *Sampson v. Eastman Kodak Company*, 552 N.E.2d 1194, 1198 (Ill.App.Ct. 1990). [*See also*, *Boeing Co. v. Van Gernert*, 444 U.S. 472 (1980); *Florin v. Nationsbank*, 34 F.3d 560, 562 (7th Cir. 1994); *Copeland v. Marshall*, 641 F.2d 880, 905 (D.C. Cir. 1980); *In Re Unisys Corp. Retiree Med. Bene. ERISA Lit.*, 886 F.Supp. 445, 455 (E.D.Pa. 1995)]. This Court has reviewed the pleadings filed in the *Hoffman* case, the proceedings prior to the fairness hearing and the transcript of the fairness hearing and has found no affirmative representations by BancBoston or Bank Counsel as to the reasonableness of the claimed attorneys' fees or as to the definition of the "economic benefit" of the settlement to the class members. The Consent Decree approved by this Court contained a detailed release of claims against BancBoston and Bank Counsel. This Court has examined the claims asserted in the Federal Class Action against BancBoston and Bank Counsel and those claims fall within the purview of the release. If a party attempts to set aside a release by claiming that he was induced to sign it through fraud, and he has received a benefit from the release, he must tender the benefit when he attempts to set aside the release. Respondents have made no such tender.

CONCLUSION

Having reviewed all evidence available to this Court including all pleadings filed in the *Hoffman* case, the proceedings prior to the fairness hearing, and the transcript of the fairness hearing, this Court finds that Respondents [sic] allegations of misrepresentation and fraud on the court are baseless. *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 647 (N.D. Cal. 1978) *aff'd and adopted by* 645 F.2d 699 (9th Cir. 1981) involved a fact pattern substantially similar to the present situation. As stated by the *Valerio* court:

> In substance, if not in form, the gravamen of plaintiffs' lawsuit is that the [former class action] settlement was inadequate. There perhaps are many who, with the benefit of hindsight, might well agree with that position. In 1973, however, we were satisfied not only with the adequacy of the representation and notice given the class but also with the adequacy of the settlement. The plaintiffs could have challenged our conclusion in the Ninth Circuit Court of Appeal. They chose not to do so. *They cannot now relitigate that issue behind a rhetorical smokescreen of fraud and conspiracy.*

Valerio, 80 F.R.D. at 658 (emphasis added).

Having treated Respondents' allegations as an "independent action under Alabama Rule of Civil Procedure 60(b)" to set aside the judgment, this Court holds that that action fails, and the Order of Settlement is reapproved in its entirety. Respondents are bound by the Order of Settlement and are precluded from reasserting the claims dismissed in the Federal Class Action in any forum.

/s/ Braxton L. Kittrell, Jr.
Braxton L. Kittrell, Jr.
Circuit Court Judge

IN THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

No. 95-55306

DAVID D. BENNETT, et al.,

Plaintiffs-Appellants,

v.

GEN-PROBE, INCORPORATED,
THOMAS H. BOLOGNA, et al.,

Defendants,

and

LAW FIRM OF JONES, WALDO,
HOLBROOK & McDONOUGH,

Appellee.

Appeal From The United States
District Court For The Southern District
Of California.
D.C. No. CV-90-01183
Judith N. Keep, *District Judge*

ARGUED April 10, 1996 - DECIDED June 14, 1996

JUDGES: Before: SCHROEDER, LEAVY, Circuit Judges and TRIMBLE[1] District Court Judge.

OPINION: MEMORANDUM[2]

Plaintiff-appellant, David D. Bennett is a former named plaintiff in Bennett v. Bologna, a securities fraud class action that was settled after Bennett opted out. Bennett appeals the district court's issuance of a permanent bar order obtained by counsel for the plaintiff class.

The class counsel who obtained the bar order argue initially on appeal that this court lacks jurisdiction to review the bar order because Bennett did not file a timely notice of appeal. *Brownier v. Director,* 434 U.S. 257, 264, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978) (timely notice of appeal both mandatory and jurisdictional). Bennett's notice of appeal was, however, timely filed with respect to the district court's denial of Bennett's motion, argued pursuant to Federal Rules of Civil Procedure 59(e) and 60, "to set aside order, and alternatively, . . . to alter or amend order." Because the district court's

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[1] Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

[2] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

denial of Bennett's motion addresses the merits of Bennett's arguments, this court reaches the merits of Bennett's appeal.

On the merits of his appeal, Bennett contends that since no federal court has jurisdiction to hear the underlying state malpractice and breach of contract claims he is seeking to litigate in Utah, the district court lacked subject matter jurisdiction to enter the bar order. The district court has jurisdiction, however, to enter orders to preserve and protect the "fruits and advantages" of its judgment. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 239, 78 L. Ed. 1230, 54 S. Ct. 695 (1934); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983) ("[a] district court retains jurisdiction to enforce the judgments it enters" and may reinforce res judicata or collateral estoppel via injunction). Thus, the district court had jurisdiction to enter a bar order to protect the finality of its class action judgment. The issue is whether this bar order serves such a purpose. The district court may not prevent a Utah court from litigating malpractice and breach of contract issues relating to appellee law firm's representation of Bennett, because such litigation does not endanger or affect the "fruits and advantages" of the district court's judgment settling the underlying class action. Further, in adjudicating Bennett's malpractice and breach of contract claims, a Utah court may examine the adequacy of the class settlement, but only insofar as that settlement sheds light on

appellee law firm's representation of Bennett. The district court was entitled to protect the district court's own judgment, and thereby ensure its finality so that the class members would still receive the same settlement; the class defendant would remain obligated to pay the same settlement, and Bennett would remain a non party with no right to any share of that settlement. *Cf. Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co.*, 542 F.2d 45, 48 (9th Cir. 1976) (injunction proper where state action, if successful, would nullify the federal bankruptcy court's order of distribution).

The bar order contains a disclaimer that it does not "restrain David D. Bennett from pursuing solely his individual claims . . . ." This should not be construed to limit Bennett to pursuit of his individual claims against the original class action defendant and to preclude any challenge to counsel's handling of the class action. The district court's order must be construed narrowly to prevent any collateral attack upon the class action judgment and its finality as between the parties to that judgment. We hold, however, that the bar order cannot be construed to prevent Bennett from litigating issues in his malpractice and breach of contract actions that relate to class counsels' handling of the class action, so long as such litigation does not undermine the finality of class action judgment. The order, as so construed, is therefore AFFIRMED.

Any further appellate proceedings in this matter, including any appeals from a contempt order, shall be referred to this panel.